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BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 11-12

HANJIN SHIPPING CO., LTD.;
KAWASAKI KISEN KAISHA, LTD.;
NIPPON YUSEN KAISHA;
UNITED ARAB SHIPPING COMPANY (S.A.G.); and
YANG MING MARINE TRANSPORT CORPORATION,

COMPLAINANTS

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

RESPONDENT

OPPOSITION TO COMPLAINANTS' MOTION FOR JUDGMENT

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The Port Authority of New York and New Jersey ("PANYNJ" or the "Port Authority"), by its undersigned attorneys, hereby submits its Opposition to Complainants' Motion for Judgment that Respondent's Cargo Facility Charge Violates 46 U.S.C. § 41102(c) ("Motion for Judgment" or "Mot. for J.").

PRELIMINARY STATEMENT

Complainants' Motion for Judgment asks Your Honor to determine, well before the completion of discovery, whether the Port Authority's Cargo Facility Charge ("CFC") violates 46 U.S.C. § 41102(c), as a matter of law. Complainants argue that the CFC is an unreasonable user fee because the carriers against which the CFC is assessed purportedly do not receive any "services" in connection with any of the CFC-funded projects at the port, which include the ExpressRail, road improvements and increased security. But Complainants' motion is founded upon (1) a fundamental misunderstanding of the law construing § 41102(c); (2) hotly disputed facts, including Complainants' intentional misrepresentation of their role in the movement of cargo through the port and flagrant misstatements regarding the language and operation of the CFC itself; and (3) Complainants' obdurate refusal to provide discovery revealing the benefits that they receive from the CFC-funded projects. Complainants' motion can easily be dismissed on multiple grounds, not the least of which is prematurity, given the myriad of disputed facts requiring examination through the discovery Complainants have withheld.

Initially, and in their Motion for Judgment, Complainants attempted to portray themselves, through clever word play and obstruction of discovery, as mere "vessel operators" whose responsibility for cargo containers ends at the water's edge. *See* Mot. for J. at 1, 15-16, 21. To perpetuate this fiction, Complainants consistently stonewalled discovery aimed at unveiling Complainants' true role as integrated global shipping and logistics enterprises that

coordinate the transportation of cargo from its point of origin, across the ocean, through the port's infrastructure, and inland to its ultimate destination. But more recently, including in briefing several discovery motions following their Motion for Judgment, Complainants have grudgingly begun to abandon their false self-portrayal and now acknowledge, at least generally, that they do receive benefits from CFC-funded projects to an as-yet unspecified extent. *See* Complainants' Opposition to Motion to Compel, dated January 10, 2013 ("Opp. to MTC"), at 2, 4-6 ("Complainants, while fundamentally vessel operators who load, carry and discharge containers, do subcontract the movement of cargo under through bills of lading to and from inland points. Some have affiliates that perform logistics services."); *see also* Mot. for J. at 13 (admitting that Complainants "enjoy some benefit" from CFC-funded projects).

Accordingly, Complainants' argument now rests on the plainly erroneous proposition that irrespective of the fact that Complainants and their logistics subsidiaries receive benefits as a result of the Port Authority's CFC-funded projects, the CFC cannot stand unless it is a fee for a "service" performed by the Port Authority. *See* Mot. for J. at 1, 13-16, 20, and 21. Putting aside that any distinction between "services" and "benefits" could be at most metaphysical, the case law Complainants themselves cite is clear that a user fee may be properly assessed for *either* a "service performed" *or* "a benefit conferred" on the entity charged, so long as the "benefit" is roughly commensurate with the amount of the fee. *See infra* at 19-20.

Complainants also skew the actual language of the CFC in an effort to create the false impression that the CFC is enforced through the threat of a blockade on vessels. *See* Mot. for J. at 4, 5, 13-16, 27-28. But the actual language of the CFC (rather than Complainants' mischaracterization of it, which provides misleading substitutes for key words and phrases),

together with the substantial documentation produced by the Port Authority, demonstrates otherwise. *See infra* at 9-10.

Finally, although Complainants have now at least begun to acknowledge that their role in intermodal transportation extends to and through the port's infrastructure to points inland, and that they *do* receive benefits from the projects and activities funded by the CFC, they continue to refuse to provide discovery that is highly relevant to the central issue in this litigation: whether the *extent* of those benefits is roughly commensurate with the amount charged. At the same time, Complainants do not even attempt to demonstrate that the benefits they receive are disproportionately less than the amount of the CFC, nor do they challenge the expert analysis of economists at Compass Lexecon, which confirms that the benefits they receive far outweigh the amount of the CFC. As a result, Complainants must either (1) be precluded from denying that benefits they receive are at least commensurate with their CFC payments or (2) provide the discovery that has long been sought. In either case, Complainants' Motion for Judgment should be denied.

BACKGROUND

A. Development of the Port Authority's Cargo Facility Charge

The Port Authority has undertaken major infrastructure projects at the port for the benefit of the users of the port, including the construction of on-dock rail facilities and substantial improvements to the port's congested roadways. *See* Response to Complainants' "Statement of Facts Not in Dispute" and Port Authority's Statement of Additional Facts, dated Feb. 1, 2013 ("SOF") ¶ 101. In addition, in the wake of the September 11, 2011 terrorist attacks, the Port Authority expended substantial, additional sums for security improvements pursuant to federal mandate. *See* SOF ¶ 106.

The CFC, which went into effect on March 14, 2011, is a user fee assessed on all cargo containers, non-containerized cargo, and vehicles upon discharge or loading onto vessels at the Port Authority's leased and public berths. *See* Tariff at Subrule 34-1200. It is designed to recoup the unrecovered costs of the on-dock rail facilities[1] and certain road improvements,[2] as well as the costs of current enhanced security measures and facilities.[3] *See* SOF ¶¶ 76, 121. Cargo containers are assessed $4.95 per TEU,[4] non-containerized cargo is assessed $0.13 per metric ton, and vehicles are assessed $1.11 each. *See* Tariff at Subrule 34-1210. These rates were derived by spreading the costs to be recovered over the projected cargo traffic for the twenty-five-year period ending in 2035. *See* SOF ¶ 120. Specifically, in calculating the CFC rates, the Port Commerce Department forecast the expected volume of cargo containers, non-containerized cargo, and vehicles over that twenty-five-year period, and apportioned the unrecovered cost of the ExpressRail and the expected costs of the roadway projects, so that the costs of the rail and roadway projects as well as a percentage of the total post 9/11 security

[1] The CFC is designed to recover, among other things, capital expenditures incurred to construct the ExpressRail infrastructure. *See* SOF ¶ 102.

[2] The important roadway projects funded by the CFC include the expansion of Port Street to increase capacity, adding lanes to McLester Street, softening the North Avenue turn to reduce the high number of traffic accidents, and other measures that "reduce truck idling times and mitigate the attendant negative environmental impact caused by idling." See SOF ¶ 105.

[3] The Port Authority's "incremental post-9-11 security costs," funded in part by the CFC, include more than $125 million invested in seaport security, "to put in place leading-edge technologies such as a closed-circuit system that integrates intelligent video, license plate readers, geospatial data and direct information downlinking," as well as security upgrades necessary to obtain certification in the U.S. Department of Homeland Security's Customs-Trade Partnership Against Terrorism program. *See* SOF ¶¶ 107, 108.

[4] "TEU" stands for "twenty-foot equivalent unit." Containers come in different sizes that are often expressed in TEUs. Most cargo containers are two TEUs and most others are one TEU. The Port Authority assumes that the average ratio of TEUs to containers is 1.7. *See* SOF ¶ 22.

upgrades would be reasonably and fairly assessed on all cargo passing through the port's improved infrastructure. *See* SOF ¶ 121.[5]

The CFC went into effect only after lengthy consideration and careful analysis by the Port Authority Port Commerce Department, which recognized the need to ensure that the contemplated fee would recoup the investment in port improvements in an even-handed manner. *See* SOF ¶ 123. In discussions with the New York Shipping Association, of which each of the Complainants is a member, it was observed that the Port Authority's then-existing Intermodal Container Lift Fee ("Rail Fee") of $57.50 for each container that used the on-dock rail facilities—a fee significantly higher than the CFC's average assessment of $8.42 on all containers[6]—had the detrimental effect of incentivizing carriers to use trucking rather than rail. *See* SOF ¶ 116.[7] This led to greater roadway congestion than would otherwise exist (together with increased costs associated with congestion), and also failed to allocate the costs of the port infrastructure and security improvements fairly among those that benefited from them. *Id.*

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[5] Complainants' assertion that the CFC is a charge for "cargo handling services" is not only disputed, but plainly has no basis in reality. *See* Complainants' Statement of Undisputed Facts ¶ 28; *see also* Mot. for J. at 3, 16. Complainants' only basis for disputing the fact that the CFC pays for infrastructure, intermodal transportation, and security appears to be a misinterpretation of a single written objection that the Port Authority made in response to one of Complainants' document requests. *See* Mot. for J. at 7-8. The Port Authority did indeed note that incoming CFC payments are not "earmarked" to be used on later particular expenditures, but that is because the CFC primarily recoups costs of projects that have already been paid for. Documents produced by the Port Authority in response to Complainants' requests show the Port Authority's infrastructure and security investments in detail, as well as a breakdown showing how the CFC is allocated to recover for the roadway, intermodal, and security improvements. *See* SOF ¶ 91.

[6] Because containers, on average are 1.7 TEUs (*see supra* n.4) and the CFC is $4.95 per TEU, the average cost of the CFC per container is $8.42. SOF ¶ 75.

[7] At the time the CFC was implemented, in addition to the Rail Fee, the Port Authority had also been charging a volume-based annual Container Terminal Subscription Fee (the "Truck Fee") in connection with the SeaLink trucker identification system used for interchange of containers between truckers or trucking companies and container terminals subsequent to unloading from the vessel or before loading onto the vessel. *See* SOF ¶ 115. The Truck Fee, like the Rail Fee, was eliminated as part of the CFC's implementation. *See* SOF ¶ 118.

Accordingly, it was agreed that the Port Authority should consider assessing a fee on all cargo containers moving through the port on an equal basis, because all of them benefit directly from the Port Authority's infrastructure and security investments. *See* SOF ¶ 117.

By the same token, the Port Authority wanted to be sure that, by replacing the Rail Fee and Truck Fee with the CFC on all containers, those carriers that primarily utilized trucks for the inland transportation of the containers would be receiving corresponding benefits. Accordingly, the Port Authority engaged economics experts from Compass Lexecon to study the benefits from the ExpressRail infrastructure projects to carriers primarily utilizing trucks, including the shift of a portion of the inland movement of cargo from truck to rail, and the attendant decrease in roadway congestion and truck waiting time. *See* SOF ¶ 126. The report issued by Compass Lexecon in December 2010—which Complainants have not even attempted to dispute—concluded that the reduced roadway congestion resulting from the ExpressRail infrastructure projects reduced the transportation costs per cargo container transported by truck by far more than the amount of the CFC, and that those benefits were likely to increase further as a result of additional traffic moving to ExpressRail because of the restructuring of the cost recovery fees. *See* SOF ¶ 127 (citing Compass Lexecon Report at 29, which estimated that "the savings [for containers transported by truck] appear to be conservatively in the range of $21.42 to $25.33 per container—substantially larger than the $8.42 per container fee proposed by the [Port Authority]").

The CFC was not developed in a vacuum. After publishing a draft of the Tariff for notice and comment, the Port Authority held numerous meetings with ocean carriers (including Complainants), terminal operators, and others to discuss the proposed Tariff, and provided multiple opportunities for comment that led to certain revisions to the CFC before final

implementation.[8] As can be seen, the CFC was not, contrary to Complainants' suggestion, a sudden knee-jerk reaction to a few carriers' requests that the Port Authority eliminate the Tariff provisions relating to the Rail Fee. *See* Mot. for J. at 9 (positing that the "genesis" of the CFC was the Port Authority's decision to cater to specific carriers). No one, other than the Complainants, has sued the Port Authority challenging the CFC, and, indeed, almost half of the original nine Complainants have dropped out of this case.

B. Implementation of the Cargo Facility Charge

The CFC became effective on March 14, 2011. Its implementing subrules are contained in the Port Authority's Tariff, Section H, Subrules 34-1200 through 34-1220. *See* SOF ¶¶ 18, 19. As described in the Tariff, the CFC is a charge assessed on all cargo containers and non-containerized cargo moving through the Port Authority's marine terminals.[9] It is assessed at the time that the cargo container or non-containerized cargo is loaded onto or unloaded from a vessel at the port. For the cargo containers, the charge is paid by the ocean common carrier responsible for the container, irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. *See* SOF ¶ 28.[10]

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[8] One revision was to require the Port Authority to generate monthly invoices for each individual ocean carrier as opposed to having the terminal operators bill the ocean carriers directly. *See* SOF ¶ 130.

[9] *See* SOF ¶ 19 (citing Tariff, Subrule 34-1200, at 50, which defines "Cargo Subject to Fee" and explains that the CFC applies to "all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths").

[10] The CFC is paid by the "user," which the Tariff defines as the "user of cargo handling services." *See* Tariff at Subrule 34-1220(1)(a). At the Port Authority's private marine terminals, where Complainants' container vessels call exclusively, the only "users of cargo handling services" are the ocean common carriers whose containers and non-containerized cargo are unloaded from or loaded onto vessels. SOF ¶ 26 (citing Declaration of Brian Kobza, dated Feb. 1, 2013 ("Kobza Decl.") ¶ 6). Therefore, for purposes of this motion, the terms "user" and "carrier" are interchangeable.

It is important to distinguish between a "common carrier" and a "vessel," a distinction that Complainants purposefully blur throughout their motion. A common carrier is defined by the Shipping Act, in relevant part, as an entity that (i) holds itself out to the general public as providing transportation by water of cargo; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses a vessel for all or part of that transportation. *See* 46 U.S.C. § 40102(6). In other words, a carrier is the party responsible for arranging and providing the transportation of cargo from, for example, Shanghai to Chicago and vice versa. *See* SOF ¶¶ 133, 134 (citing Kobza Decl. ¶ 17). A vessel, on the other hand, is simply a watercraft used to transport cargo on water. Carriers may move containers on their own vessels or arrange to transport their containers on other carriers' vessels pursuant to a vessel sharing agreement, slot charter or other arrangement. *See* SOF ¶ 132. Conversely, a carrier might transport several other carriers' containers on its own vessels. *Id.* It is the carrier that has contracted and issued a bill of lading for the carriage of the goods, *i.e.*, that is responsible for the particular shipment, not the carrier that happens to own and/or operate the vessel transporting the containers, that is responsible for paying the CFC. *See* SOF ¶ 26. Thus, Complainants' assertion that the CFC is "a terminal tariff charge on vessels" (Mot. for J. at 1) is simply wrong, as is their assertion that the CFC is assessed against "any vessel calling at any terminal" (Mot for J. at 3).

By placing the obligation to pay the CFC on the carrier that has taken contractual responsibility for the carriage of the goods, the CFC is assessed on the party most directly responsible for the movement of the cargo container from its point of origin, through the port, and onward to its final destination. *See* SOF ¶ 26 (citing Declaration of Peter Zantal, dated Feb. 1, 2013 ("Zantal Decl.") ¶ 37). Carriers contract directly (or through their own subsidiaries) with

all the other major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. Complainants' and other carriers' position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC themselves or to further allocate it to others in the chain as they see fit. *See* SOF ¶ 147 (citing Kobza Decl. ¶ 17). In addition, by triggering the obligation to pay the CFC at the point when the cargo containers are unloaded from or loaded onto vessels at the port, the Port Authority ensures that all cargo containers bear their fair share, *see* SOF ¶ 141, and also can make efficient use of the existing administrative structure already in place at the marine terminals to account for each cargo container and collect the fee.[11] *See* SOF ¶ 144. By collecting the CFC in this manner, the Port Authority can avoid the need to charge a higher CFC rate to cover the higher administrative costs of a less efficient system. *See* SOF ¶ 145.

C. Enforcement of the CFC

If a carrier does not pay the invoiced CFC charges for two consecutive reporting periods (a "non-compliant carrier"), the practice of the Port Authority is to contact both the non-compliant carrier and each private terminal operator to remind them of the outstanding balance. *See* SOF ¶ 37 (citing Zantal Decl. ¶ 38). If the balance remains unpaid, the Tariff authorizes the Port Authority to issue a directive requiring each terminal operator either to cease service to the

[11] The terminal operators—which already had a process in place for invoicing and collecting fees from the carriers when the CFC became effective—send a monthly Vessel Activity Report ("Report") to the Port Authority detailing each carrier's activity at their terminals that is subject to the CFC. *See* SOF ¶ 32. Monthly invoices are then issued by the Port Authority to private marine terminal operators for each of the carriers calling at that terminal based on the prior month's Report. *See* SOF ¶ 34; Tariff, Section H, Subrule 34-1220, 3(b)(i). The terminal operator then collects the CFC from each carrier incurring the charge and forwards the payments to the Port Authority. *See* SOF ¶ 30. Some carriers have chosen to pay the CFC directly to the Port Authority. *See* SOF ¶ 31.

non-compliant carrier or to take financial responsibility itself for payment of that carrier's CFC charges. Tariff, Section H, Subrule 34-1220, 3(b)(iii). Thus, a non-compliant carrier's cargo containers may still be moved through the port where a terminal operator accepts financial responsibility for paying the CFC on the non-compliant carrier's behalf. *See* SOF ¶ 37.

Only a non-compliant carrier, ***but not a vessel***, risks being unable to move its cargo containers through the port by failing to pay the CFC. *See* SOF ¶ 37. For example, a vessel owned by a non-compliant carrier is permitted in the port to load and unload the containers of any compliant carrier that are transported on the vessel. *See id.* Likewise, a vessel owned by a compliant carrier that is transporting containers of both compliant and non-complaint carriers is also permitted in the port and can discharge and load the containers of any compliant carrier. *See id.* But in any of these circumstances, the vessel itself is allowed to berth at the port. *See id.*[12]

D. The Complainants

Complainants are all ocean common carriers within the meaning of the Shipping Act, 46 U.S.C. § 40102(6). *See* SOF ¶ 1; Compl. ¶ III B. Accordingly, while one aspect of Complainants' business enterprise is the operation of vessels, *see* SOF ¶ 1, their business is not so limited, as Complainants have now grudgingly begun to admit. *See* Opp. to MTC, at 4. Rather, as discussed further below, Complainants are highly integrated global shipping and logistics companies that coordinate the transportation of cargo not only from its point of origin across the ocean, but also through the port's infrastructure and inland to its ultimate destination. *See infra* at 15-16. Indeed, like other carriers, Complainants almost always either own or lease the cargo containers against which the CFC is charged. *See* SOF ¶ 133.

[12] Thus, Complainants' assertion that the CFC is enforced by threat of a "blockade" on vessels is simply false. *See* Mot. for J. at 4-5.

E. Procedural History

Complainants initiated this proceeding on August 5, 2011, by filing a Complaint for Cease and Desist Order and Reparations, seeking redress for alleged violations of the Shipping Act, 46 U.S.C. §§ 41102(c) and 41106(2). Compl. ¶ III.C. Evidently recognizing the futility of their discrimination claim under 46 U.S.C. § 41106(2), Complainants subsequently dropped that claim. *See infra* n. 26. Complainants' only remaining claim for relief is that the CFC violates 46 U.S.C. § 41102(c), because the amounts Complainants pay under the CFC are purportedly not commensurate with the benefits they receive from projects funded by the CFC. *See generally* Motion for J.; *see also* Compl. ¶ V (arguing that that the Port Authority's "adoption, application, implementation and enforcement of [the Cargo Facility Charge amounts to an] unlawful exaction of fees not commensurate with services provided").[13]

Over the past year, four of the nine Complainants have withdrawn from this case. Motions to Withdraw, dated October 25, 2011 (China Shipping), August 2, 2012 (Horizon), and November 16, 2012 (Cosco and Evergreen).[14]

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[13] Complainants previously moved for partial summary judgment in January 2012 on the unpleaded assertion that the CFC by its terms does not apply to empty cargo containers. *See generally* Complainants' Motion for Partial Judgment, filed Jan. 11, 2012. Complainants' motion, which was premised on nothing more than misguided wordplay, ignored the express language of the CFC, which states that it applies to "all cargo containers" without regard to whether the cargo containers are full, partially full, or empty. *See generally* PA Response to Motion for Judgment, dated Jan. 26, 2012. That motion remains pending.

[14] Complainants' original counsel, Manelli Selter also withdrew from this litigation in May 2012, just weeks after the Port Authority moved to disqualify George Quadrino and that firm due to Mr. Quadrino's prior involvement in this litigation while himself working for the FMC. *See* Motion to Withdraw from Representation, dated May 15, 2012. The law firm that replaced the Manelli firm, Cichanowicz, Callan, Keane Vengrow & Textor LLP, has now also moved to withdraw from representing Complainants in this litigation due to [redacted] [redacted] *See* Declaration of Reed Collins, dated Feb. 1, 2013, ("Collins Decl.") ¶ 23, Ex. V (e-mail from Cichanowicz firm to Port Authority's counsel).

F. Complainants' Obstruction of Discovery

Since September 1, 2011, the Port Authority has diligently sought discovery into Complainants' logistics operations at the port in order to probe Complainants' actual role in the movement of cargo containers through the port as well as the central issue in this litigation, *i.e.*, the extent to which Complainants are thereby benefited by the rail, road, and security projects funded by the CFC. Based on the initial Complaint, which absurdly alleged that Complainants received "nothing" in return for paying the CFC (Compl. ¶ IV.BB)—a position abandoned in Complainants' current motion papers[15]—the Port Authority served discovery requests concerning the actual extent to which Complainants do, in fact, utilize and benefit from the port infrastructure and security improvements that are funded by the CFC. Despite the clear relevance of this discovery to the allegations of the Complaint (and the Motion for Judgment), Complainants have either flatly refused to comply with their discovery obligations or sought to block that discovery by one means or another at every turn.

Complainants' obstructions already have been detailed in the submissions currently pending before Your Honor concerning several discovery disputes. *See generally* Letter dated Dec. 20, 2012, responding to Complainants' request to stay discovery; Motion to Compel Production of Contracts, dated Jan. 3, 2013 ("Mot. to Compel"); Opposition to Omnibus Motion to Quash, dated Jan. 3, 2013 ("Opp to MTQ"); Opposition to Complainants' Motion for Protective Order, dated Jan. 11, 2013 ("Opp. to MPO"). The Port Authority will not repeat the arguments set forth in those submissions, but will note here that Complainants' dilatory tactics have prevented the Port Authority from discovering highly relevant evidence regarding the extent to which Complainants benefit from the infrastructure, intermodal transportation, and

[15] *See supra* at 14-16.

security services funded by the CFC, given Complainants' central role in the movement of cargo through the port. Such evidence includes, but is not limited to:

- The economic terms on which Complainants provide transportation of cargo containers through port infrastructure and further inland, as reflected in Complainants' contracts with beneficial cargo owners;[16]
- The economic terms on which Complainants arrange or provide transportation of cargo containers via the rail and roadway projects funded by the CFC, as reflected in their contracts with rail and motor carriers;[17]
- Whether Complainants provide the above services (and hence use CFC-funded infrastructure) on their own or through their subsidiaries, as reflected in their corporate arrangements with subsidiary logistics companies;
- Complainants' actual costs to transport cargo containers to or from the Port of New York and New Jersey by rail and by truck.

See generally Rule 56(d) Declaration of Jared R. Friedmann, dated Feb. 1, 2013 ("56(d) Decl.") (citing Fed. R. Civ. P. 56(d)).

The Port Authority expects that the discovery being withheld by Complainants and their logistics subsidiaries will further confirm that the cost of the CFC is not merely commensurate with, but easily outweighed by, the benefits Complainants receive from CFC-funded projects and services, as set forth in the unchallenged report by Compass Lexecon, dated December 12, 2010 as well as the Supplemental Declaration of Frederick Flyer and Allan Shampine, dated January 31, 2013 ("Flyer/Shampine Supp. Decl.") ¶ 8 ("[T]he substantial benefits the carriers receive from the ExpressRail system alone exceed the fees imposed on them through the CFC."). But, as

[16] The cost structure of Complainants' arrangements with cargo owners affects the amount of the benefits they gain from port efficiencies. Complainants may well earn more money for moving more containers or moving them more quickly due to CFC-funded improved infrastructure than any cost they incur due to the CFC, particularly if they are able to pass some or all of such costs on to their customers.

[17] For example, if a Complainant pays a motor carrier a roadway congestion surcharge, then to the extent that either the ExpressRail or the roadway expansion projects funded by the CFC reduce such congestion, Complainants would directly benefit.

reflected in the several discovery motions already pending before Your Honor, Complainants have steadfastly resisted such discovery, doubtless because compliance would unmask the full extent of the benefits they receive as well as the spuriousness of both their Motion for Judgment and their entire position in this litigation.[18] *See generally* 56(d) Decl.

G. The Motion for Judgment and Complainants' Subsequent Admissions

On December 6, 2012, Complainants submitted their Motion for Judgment, in which they settled upon their rather peculiar theory of the case: that the CFC is unreasonable because they do not benefit in *any* direct or meaningful way from the port projects and activities funded by the CFC. *See* Mot. for J. at 1, 15-16, 21. Their motion was based on the now-abandoned contention that Complainants are mere "vessel operators" whose responsibility for containers and cargo ends at the water's edge, and that they therefore have no financial interest in improvements to port infrastructure and security. *See id.* at 23 ("But, the CFC cannot be dropped wholly on the shoulders of vessel operators who do not feel discernible impact any different from that of lessee terminals or cargo interests."); *see also* Compl. § IV, ¶¶ V, X, BB ("Complainants generally do not use the system for the interchange of containers between trucks and container terminals . . . because the movement of containers beyond the terminals by truck usually is not within the Complainants' terms of carriage" and "Complainants generally do not use the ExpressRail system" and therefore "will pay millions in CFC payments ***for nothing***") (emphasis added). While Complainants vaguely conceded in their motion that they might receive "some benefit,"

[18] While Complainants have interjected vague, boilerplate objections that providing the requested discovery would be too burdensome, they have never even attempted to spell out the nature and extent of the supposed burden as is required to sustain such objections. *See, e.g., Miller v. Holzmann*, 240 F.R.D. 1, 3 (D.D.C. 2006) ("Like every other judge, I will not consider the objection that an interrogatory is overbroad and burdensome without a showing by affidavit why it is overbroad and burdensome.").

they seem to suggest that any benefit was entirely general or indirect, or for the "common good," or somehow otherwise meaningless. Mot. for J. at 13.

Of course, Complainants' argument purposefully ignored the way Complainants actually do business, as they have finally, if grudgingly, begun to acknowledge in opposing the Port Authority's efforts to compel discovery of Complainants' subsidiary logistics companies as well as of Complainants' agreements with cargo owners, rail carriers, and motor carriers—all of which the Port Authority anticipated would help expose Complainants' key role in moving cargo through the port's infrastructure. *See generally* Opp. to MTQ; Mot. to Compel. Accordingly, Complainants finally admitted *some* of what the Port Authority has always believed: that Complainants do, in fact, provide "intermodal through transportation of containerized cargo"; "subcontract the movement of cargo under through bills of lading to and from inland points" via rail and truck; "have affiliates that perform logistics services"; and that their operations at the port and globally include the provision of intermodal transportation and other logistics services. *See* Opp. to MTC at 4-6. In other words, contrary to the nonsense upon which their Motion for Judgment was based—that Complainants are simple "vessel operators" and "not 'users' of the Port's cargo services in their containerized cargo operations" (*see* Mot. for J. at 17, 20, 23)—Complainants are in fact highly integrated global shipping and logistics companies that coordinate the transportation of cargo not only from its point of origin and across the ocean, but through the port's infrastructure and then inland to its ultimate destination. *See* Opp. to MTC at 4-6. As such, Complainants stand at the very center of the economic and logistical transport chain in which shippers, carriers, intermediaries, trucking companies, and rail carriers move cargo through the Port of New York and New Jersey. *See* SOF ¶ 152. This is consistent with

what Complainants say on their own websites, that they have "comprehensive logistics services," which "connect[ ] every city via major ports" via "rail, truck and feeder." SOF ¶¶ 135, 136.

Complainants, while conceding that they in fact benefit from these CFC-funded projects, at the same time also oddly note that they do not challenge the extent of the benefits they receive. *See* Mot. for J. at 13 (conceding that Complainants "enjoy some benefit" and "are not going to argue the point" that they benefit); *id.* at 14 (arguing that their benefits are "inherently impossible to measure"); Motion for Protective Order, dated Jan. 4, 2013, at 3 (cavalierly stating that "Complainants have no intention of engaging in a pillow-fight between 'experts'" over benefits received). Indeed, Complainants do not even attempt to address the Compass Lexecon Report of December 2010, which concluded, following a detailed expert economic analysis, that the benefits conferred on Complainants and other carriers by CFC-funded infrastructure projects exceed the CFC's cost. *See supra* at 6, 13, *see also* Flyer/Shampine Supp. Decl. ¶ 12 (concluding that the benefits to Complainants are "well in excess of the level of the CFC").

As a result of Complainants' concessions, it is patent that their business operations *directly benefit* from efficiencies gained through the improvements in safety, port infrastructure, and intermodal transportation, all of which are funded by the CFC. All that remains of their attack on the benefits of the CFC is, as discussed below, the spurious contention that those benefits are wholly irrelevant under § 41102(c). *See infra* at 18-25.

ARGUMENT

I. Summary Judgment Standards and Procedure

The Commission has made clear that summary judgment is an "extreme remedy" that is not favored, and is appropriate only where the pleadings and record show "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing

law." *See McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line*, 27 SRR 1045, 1052 (FMC June 23, 1997) (internal citations omitted).

The burden of demonstrating that summary judgment is appropriate lies with the movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *accord Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, No. 08-03, at 4-5 (FMC Jan. 31, 2013). "[A]ny doubt as to the existence of a genuine issue of material fact will be resolved against the movant." *McKenna Trucking Co., Inc.*, 27 SRR at 1051 (*quoting* 10A Wright, Miller and Kane, *Federal Practice and Procedure*, Section 2727 at 121-129).

When a party shows that it "cannot present facts essential to justify its opposition," a court may deny the motion for summary judgment, or defer considering the motion to allow time for further discovery. Fed. R. Civ. P. 56(d). Summary judgment is especially inappropriate when, as here, discovery is still in its infancy and pertinent discovery requests are outstanding. *See, e.g., The Apple iPod iTunes Anti-Trust Litig.*, Nos. C 05-00037JW & C 07-06507JW, 2010 WL 2629907, at *1, *9 (N.D. Cal. Jun. 29, 2010) ("In general, summary judgment should not be granted while pertinent discovery requests are outstanding . . ."); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 845 (N.D. Cal. 2004) (summary judgment should not be granted where the opponent "identifies relevant information to be discovered, and there is some basis for believing that such information actually exists"); *Int'l Freight Forwarders & Custom Brokers Assoc. of New Orleans, Inc. v. LASSA*, 27 SRR 392, 394 (FMC Nov. 30, 1995) (finding that the case was

"ill suited to summary disposition" where one party had not had a fair opportunity to develop facts necessary to support its position).

As discussed below, not only do Complainants misconstrue or wholly ignore the applicable law, but also there are myriad disputes of material fact that preclude summary judgment in their favor. Indeed, Complainants' motion for summary judgment is clearly premature and inappropriate not only because discovery is still in its early stages, but also particularly because Complainants have stonewalled discovery to hide information that would be detrimental to their litigation position.

II. Complainants' Admissions About the Benefits They Receive From the CFC Preclude Any Determination That They Are Entitled to Judgment As a Matter of Law

The Shipping Act provides that a marine terminal operator (such as the Port Authority) may not "fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).[19] A charge levied by a marine terminal operator is "just and reasonable" for purposes of section 41102(c) if it is "reasonably related to an actual service performed *or* a benefit conferred on the person charged." *West Gulf Maritime Assoc. v. Port of Houston*, 18 SRR 783, 790 n. 14 (FMC Aug. 16, 1978) ("WGMA I") (emphasis added). Accordingly, when deciding claims under § 41102(c), courts consider whether the charge is reasonably proportionate to the services *or* benefits provided to the person paying the charge. *See Volkswagenwerk Aktiengesell-Schaft v. FMC*, 390 US 261, 282 (1968) ("The question under § 17 is . . . whether the correlation of [the] benefit to the charges imposed is reasonable."). Thus, evaluating the legality of the CFC under § 41102(c) requires a comparison between the amount charged and the extent of the

[19] Section 41102(c) is the recodification of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. App. 1709(d)(1). The same requirement was carried forward from section 17 of the Shipping Act of 1916, 46 U.S.C. App. 816.

benefits that Complainants receive from the infrastructure, intermodal transportation, and security projects funded by the CFC. *See id.* at 281-82; *Baton Rouge Marine Contractors, Inc. v. Fed. Maritime Comm'n*, 655 F.2d 1210, 1217 (D.C. Cir. 1981) (cited by Complainants, and holding that *Volkswagenwerk* requires the FMC to undertake a "comparative evaluation of relative benefits").

Neither the FMC nor the courts require that the amount of the charge be *precisely* linked to the services and/or benefits provided. *See, e.g., Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 FMB 415, 419 (FMB Aug. 4, 1961) (recognizing that at times there "can be no precise equivalence between services rendered and the charges"); *see also Volkswagenwerk*, 390 U.S. at 281 (finding that "a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under § 17 of the Shipping Act, even though not all members of the group receive equal benefits"). The standard merely requires that the charge reflect "the reasonable cost and value of services and facilities which it can and does make available and which are for the benefit of the vessel." *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 FMC 155, 161 (Dec. 2, 1965).

A. Complainants' Spurious "Services" Argument

As noted above, Complainants have fully retreated from any argument that they do not benefit from the infrastructure improvements, intermodal transportation, and additional security funded by the CFC. *See supra* at 14-16. Recognizing that their status as beneficiaries of the CFC is inescapable, Complainants have tried to invent a requirement—found nowhere in the law and indeed contradicted by the very cases they cite—that even where benefits are conferred and received, a charge cannot stand unless a "service" is also provided in exchange. *See* Mot. for J. at 1, 13-14, 15-16, 20, and 21. This is simply wrong. As the cases cited above and in

Complainants' own motion plainly confirm (*see* Mot. for J. at 21), Complainants may properly be charged a user fee for ***either*** a "service performed" ***or*** a "benefit conferred." *See WGMA I*, 18 SRR at 790 n.14 (stating that charges must be reasonably related to "an actual service performed ***or a benefit conferred*** on the person charged") (emphasis added); *Volkswagenwerk*, 390 U.S. at 282 (holding that the question is whether "the correlation of [the] ***benefit*** to the charges imposed is reasonable") (emphasis added).

Complainants' artificial focus on "services" (to the exclusion of "benefits") is directly contravened by *Indiana Port Commission v. Bethlehem Steel Corp.*, 521 F.2d 281 (D.C. Cir. 1975). In *Indiana Port Commission*, the IPC paid to construct both a harbor and a public terminal facility and then sought to recoup its expenditures by assessing a tariff on all "vessels entering the Harbor." *Id.* at 281. Although the FMC had determined that the IPC provided no "services" to vessels using the harbor, and the Court of Appeals agreed that no "service" performed by the IPC was sufficient to justify the tariff under the Shipping Act, the Court of Appeals was unable to reach the same conclusion with respect to "benefits." As the court held in reversing and remanding to the Commission, the IPC could be said to confer identifiable benefits through its investment in the harbor itself. *Id* at 287. And a proper analysis of those benefits, even in the absence of "services" performed by the IPC, could justify the IPC's tariff. *Id.* Thus, in evaluating a charge under § 41102(c), the question is whether the charge is reasonably related to either the services ***or*** benefits provided. [20] Were the law otherwise, the Commission would

[20] *See also Evans Cooperage Co., Inc.*, 6 FMB at 418-419 (rejecting claim that "charges are unreasonable because no specific service is rendered to the complainant" and upholding charge to defray facility costs, which included access to fire tug, police, and mooring facilities adequate for Complainant's barge); *West Gulf Ass'n v. Port of Houston Authority*, 18 S.R.R. 783, 790 (FMC Aug. 16, 1978) (finding that charges against users were reasonable, and stating that "[t]here is no question that vessel owners, agents, and cargo interests are 'users' of the terminal

find itself in the business of attempting to draw meaningless distinctions between benefits that are based on "services" and those that are not.

Indeed, as long as appropriate benefits are conferred, fees need not be used to pay for individualized services but rather may be used to recover the cost of improvements to port facilities, or to fund port-wide services that enhance the safety of the port generally. *See West Gulf Ass'n v. Port of Houston Authority*, 22 FMC 420, 425 (FMC 1980) (holding that respondents were empowered to prescribe fees and charges to be collected for use of their land improvements and facilities); *Evans Cooperage*, 6 FMB at 418-419 (upholding charge to defray facility costs, which included access to fire tug, police, and mooring facilities adequate for Complainant's barge). The Port Authority's use of the CFC to fund the rail and roadway infrastructure that Complainants use, as well as security services that protect Complainants' cargo, is thus well within the bounds of established precedent.

B. The Benefits That Complainants Admittedly Receive From CFC-Funded Projects Are Sufficient to Uphold the CFC Under § 41102(c)

Because Complainants concede that they benefit from these CFC-funded projects, only the *extent* of that benefit, and whether the amount charged is reasonably proportionate, remain to be decided. *See supra* at 14-16, 18-19. But Complainants have not even attempted to show that the benefits they receive are not commensurate with the charge. Quite the contrary, Complainants expressly disclaim any intention of mounting their own challenge to the amount of benefits they receive, at least for purposes of their Motion for Judgment. *See supra* at 16.

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facilities"—even if they do not directly use the facility—because they "derive a benefit therefrom").

Meanwhile, the Port Authority has submitted its own evidence—totally unchallenged by Complainants—that the benefits to Complainants are quite substantial and easily outweigh the cost of the CFC. For example:

- The Port Authority's construction of the on-dock ExpressRail (also funded by the CFC) has improved the efficiency with which Complainants can transport cargo containers through and beyond the port by rail, eliminating the extra step of transporting cargo containers from the dock to the off-port railway. SOF ¶ 160.

- The availability of ExpressRail, together with the expansion of the port's roadway capacity, reduces congestion on port roadways, thereby reducing Complainants' costs to move cargo containers by truck. SOF ¶ 161.

- The Port Authority's roadway projects, including widening certain areas, has reduced accidents which are costly not only to those directly involved, but also to other port users because of the traffic and congestion they create. SOF ¶ 162.

- The additional port security funded by the CFC reduces not only the risk of damage to Complainants' property (including their cargo containers), but also the risk of costly theft or sabotage of cargo, for which Complainants may become responsible to their customers. SOF ¶ 159.

Indeed, before instituting the CFC, the Port Authority engaged outside expert economists, who determined that the expected savings to carriers from reduced truck congestion *alone* would more than offset the amount of the CFC. *See supra* at 6, 13 (discussing Compass Lexecon Report). Compass Lexecon's Supplemental Declaration further confirms that "the carriers receive economic benefits, some of which we have quantified in our prior declaration, from the ExpressRail system, roadway improvements and security enhancements funded by the CFC." SOF ¶ 164 (quoting Flyer/Shampine Supp. Decl. ¶ 8). Specifically, Compass Lexecon concluded that carriers benefit from ExpressRail when they arrange container moves through the port via truck, because the reduced costs associated with expedited travel times through the port exceed the fee imposed by the CFC. SOF ¶ 165.[21] Moreover, the estimated cost reduction of

[21] Because the trucking industry is highly competitive, Compass Lexecon concluded that any savings experienced by truckers would be passed on to those engaging trucking services, *i.e.* the

$21 to $25 per container was conservative because it measured only *some* of the benefits from only *some* of the projects and services funded by the CFC:

> Our estimates of the amount of benefits received in connection with the CFC-funded projects and activities are conservative because our prior declaration looked at only part of the benefits (excluding, for example, the benefits from reducing the number of accidents) and because the CFC as implemented subsequent to our prior declaration funds a broader range of projects than just ExpressRail, including direct road improvements and security enhancements. We understand that the roadway infrastructure improvements, which also are associated with the CFC, are specifically intended to provide further reductions in congestion, travel time and truck idling time. Therefore, these improvements further increase the total benefits flowing from the CFC beyond those estimated in our prior declaration, which were already well in excess of the level of the CFC.

SOF ¶ 167 (quoting Flyer/Shampine Supp. Decl. ¶ 12). In sum, Compass Lexecon concluded that the ExpressRail system and roadway infrastructure projects funded by the CFC provide transportation efficiencies at the port, which provide direct and quantifiable economic benefits to the carriers, including Complainants, that are "well in excess of the level of the CFC." *Id.* ¶ 168 (quoting Flyer/Shampine Supp. Decl. ¶ 12).

Given the Port Authority's unchallenged evidence that the benefits of the CFC to carriers, such as Complainants, far outweigh the costs,[22] Complainants cannot possibly be entitled to a

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carriers. SOF ¶ 166 (citing Flyer/Shampine Supp. Decl. ¶ 12). Furthermore, even in instances where the cargo owner, rather than the carrier, engages the trucking services, the reduction in trucking costs nonetheless benefits carriers by allowing them to increase their pricing (including passing through the full amount of the CFC), while still offering a lower total cost to the cargo owner than would exist in the absence of the infrastructure improvements. *Id.* (citing Flyer/Shampine Supp. Decl. ¶¶ 13-14).

[22] We also note that the evidence as to the reasonable relationship between the CFC and the cost of the projects it funds is likewise undisputed. Complainants do not dispute that the amount of the CFC reflects the cost to the Port Authority of the projects and activities which benefit Complainants. *See, e.g., WGMA I*, 18 SRR at 790 ("A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service."). As set forth above at pages 3-6, the CFC rates were

contrary judgment as a matter of law. At the very least, there are genuine disputes of material fact,[23] which for purposes of this motion must be resolved against the movant. *See supra* at 17 (citing *McKenna Trucking Co., Inc.*, 27 SRR at 1051).

Moreover, the Port Authority managed to make this demonstration despite Complainants' stonewalling of the very discovery that was designed to paint a far clearer picture of the benefits they receive from CFC-funded projects and services. *See supra* at 12-14. Complainants' concealment of their corporate and financial relationships with their subsidiary logistics companies, as well as the economic terms of their arrangements with cargo owners and rail and motor carriers, has stymied the Port Authority's efforts to portray those benefits with evidentiary detail. *See* SOF ¶ 1 (citing Kobza Decl. ¶ 15). By the same token, these discovery violations have deprived Your Honor of a more complete evidentiary record upon which to evaluate the impact of the CFC on Complainants' businesses. *Cf. Baton Rouge*, 655 F.2d at 1217 (vacating and remanding the FMC's ruling because the Commission, in evaluating a charge for use of an automated shipping gallery, "ignore[d] evidence concerning the impact of automation on stevedore prices and profits").[24] Thus, not only have Complainants failed to challenge the Port

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determined through extensive analysis by the Port Commerce Department and were calculated to specifically recover the unamortized costs of the ExpressRail and roadway projects, and to cover a percentage of the post-9/11 security upgrades at the port.

[23] Indeed, Complainants' motion is replete not only with sharply disputed material facts, but also with outright falsehoods concerning the operation of the CFC itself. *See supra* at 5, 7-10 & notes 5, 12.

[24] Complainants devote considerable space in their brief to *Baton Rouge* as well as two other decisions that supposedly help them because the fee at issue was ultimately struck down under § 41102(c) or its predecessors. *See* Motion for J. at 22-26 (citing *Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 SRR 1123 (FMC July 30, 1997) and *Dreyfus v. Plaquemines Port Harbor & Terminal Dist.*, 21 SRR 219 (FMC Nov. 17, 1981)). But what *Baton Rouge* and the other two cases show is that challenging a fee under § 41102(c) requires a more extensive factual record than exists here, where discovery is still in its infancy. *See Flanagan*, 27 SRR at 1131 (examining, for example, contract produced in discovery to determine the actual scope of the parties' respective responsibilities for cargo, in order to evaluate benefits

Authority's evidence, but their refusal to produce highly relevant information in discovery, as detailed in the accompanying 56(d) Declaration, alone warrants denial of their Motion for Judgment under Rule 56(d). *See supra* at 17-18. Complainants cannot prevail on a motion for summary judgment by withholding the very evidence that would help defeat it.

C. Complainants Are Not "Unlawfully Singled Out" To Pay the CFC

To the extent Complainants intend to argue that they are "unlawfully singled out to pay the CFC" (Opp. to MTC at 1), that argument fails as well. To begin with, the Port Authority fairly allocates the CFC across all cargo containers by charging containers of equal size an equal rate. Because the cost of the CFC is $4.95 per TEU for cargo containers, the amount that any carrier pays is directly proportional to the number and size of containers that the carrier moves through the port. Thus, the only remaining question is whether carriers—as opposed to cargo owners, rail carriers, motor carriers, or any of the other players that have some role in the transportation of cargo from point to point— are at the appropriate point in the chain at which to assess the CFC.

In that regard, the Commission has previously upheld the practice of collecting fees through "the party who can most efficiently effectuate and enforce the same." *WGMA I*, 18 SRR at 790 (noting that, by allocating fees based on efficiency concerns, problems determining responsible parties were eliminated, and the volume and costs of invoicing wharfage charges

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to different parties); *see generally Dreyfus*, 21 SRR 219 (49-page opinion detailing third-party contracts, the extent of complainant's port use, and voluminous other evidence in determining whether harbor fees reasonably related to benefits conferred by the port). In any event, as discussed above, Complainants already admit that, unlike in the cited cases, Complainants *do* benefit from their use of the infrastructure, intermodal transportation, and security improvements funded by the CFC. *See supra* at 15-16; *cf. Dreyfus*, 21 SRR at 258 (finding, by contrast, that complainant did not benefit from the services at issue because "a shipment of grain owned by Dreyfus is never attended by the coroner, conveyed to a hospital in a parish ambulance, etc., and it is assessed 10 cents a net ton for services it has not received").

were drastically reduced). This practice has been found to be reasonable and to "promote overall port efficiency" as it ensures that all revenues due to the port are collected by extending liability for the tariff to "parties over whom the port has the highest degree of collection leverage." *Id.*; *see also Palmetto Shipping & Stevedoring Co., Inc. v. Georgia Ports Authority*, 24 SRR 761, 765 (FMC Jan. 29, 1988) (the "relevant inquiry would appear to be who has the better ability to require advance security from ... principals").

Here, the carriers are the most appropriate parties to be charged the CFC because of the nature of their businesses and their central role in the movement of cargo containers through the port and beyond. As discussed above, the carriers stand at the center of the logistical transport chain in which shippers, carriers, intermediaries, trucking companies, and rail carriers move cargo through the port. *See supra* at 15-16. They coordinate point-to-point transportation by negotiating directly (or through their own subsidiaries) with all the major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. *See id.*; SOF ¶ 146 (citing Kobza Decl. ¶ 14). Indeed, in many instances, Complainants and their own subsidiaries *are* those major players. *See supra at* 15-16 (detailing Complainants' admissions about their subsidiaries' provision of intermodal transportation and logistics services at the port). Complainants' position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC themselves or to further allocate it to others in the chain as they see fit, by adjusting the rates they charge their own customers or the amounts they pay to rail and motor carriers for inland transport [25]

[25] Carriers can and routinely do pass through their costs to the BCOs and other stakeholders. For example, Hanjin and Yang Ming have recently levied "congestion" surcharges on their

Additionally, as noted above, by charging the CFC to the carriers and billing through the MTOs, the Port Authority incurs only nominal administrative costs, thus avoiding the need to charge a higher CFC rate to cover such costs. *See* SOF ¶ 145. Adopting Complainants' suggestion that the CFC should be charged to others instead, such as the beneficial cargo owners ("BCOs") (*see* Mot. for J. at 11), would likely result in hit-and-miss or unequal assessment of the CFC, and at a minimum, would sharply raise the administrative costs (and with them, the amount of the CFC). For example, in order to collect the CFC from the tens of thousands of BCOs that use the port, millions of additional dollars would have to be invested in infrastructure improvements necessary to create a system of collection, and then significant additional sums would be required to implement, maintain, and enforce the system. *See* SOF ¶ 145. And even if such a program could be fully and fairly implemented, a full roll-out could take years. *See id.*[26]

III. The Carriers' Various Other Contentions Are Either Legally Groundless or Based on Misrepresentations of the Facts

Complainants contend that even though they do not challenge the amount of benefits they receive from CFC-funded projects, the CFC purportedly fails § 41102(c) for various other reasons. These arguments have no basis in either law or fact.

First, Complainants argue that the CFC is inapplicable at the container terminals where the carriers' vessels are served because the Tariff "includes an exception for leased premises."

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customers as compensation for slowdowns at American ports. *See* SOF ¶ 155. REDACTED [redacted] s. *See* SOF ¶ 154.

[26] Even if other classes of port users also benefit from CFC-funded projects and services, Complainants have *expressly waived* any possible claim that the CFC discriminates against ocean carriers under 46 U.S.C. § 41106. *See* Declaration of Jared R. Friedmann dated Jan. 11, 2013 ("Friedmann Decl."), Ex. C, at 2 (letter dated Oct. 2, 2012 from Complainants' counsel to Port Authority's counsel, copying FMC Secretary, announcing intention to withdraw claims under § 41106); Mot. for J. at 1 (requesting a limited ruling only on claims under § 41102(c); Motion for Protective Order, dated Jan. 4, 2013, at 2 (stating Complainants will "conduct their case in accordance with their significantly narrowed theory of the case and the facts presented in their Motion [for Judgment]").

Mot. for J. at 17 (citing Tariff Subrule 34-090). But the exception in Subrule 34-090 upon which Complainants rely refutes Complainants' contention by its own terms. The very sentence of Subrule 34-090 emphasized in Complainants' motion states that this exception to the Tariff applies "*unless* provision is made in the lease for application of said Rules and Regulations for leased premises." And because the leases issued by the Port Authority routinely include exactly such a provision requiring the application of the Rules and Regulations at the leased premises, the Tariff is fully applicable at the leased premises where the carriers' cargo is loaded or unloaded. *See* SOF ¶¶ 59, 61 (citing leases).

Next, Complainants argue that because they have a contractual relationship with MTOs for the provision of services at the port (*i.e.*, for berthing and stevedoring), the Port Authority is somehow precluded from applying the CFC to the carriers. *See* Mot. for J. at 17-20. This is a complete *non sequitur*. The fact that Complainants have "actual contracts" with MTOs (*i.e.*, terminal lessees) at leased premises in no way precludes the applicability of the Port Authority's publicly available Tariff to the carriers though an implied contract.[27] Complainants' argument is based on the patently false and, indeed, absurd premise that the MTOs with which the carriers have actual contracts provide the "same services" to the carriers as the infrastructure improvements and security services covered by the Tariff:

[27] Complainants are in privity with the Port Authority through implied contracts. Per the very regulations of the Shipping Act cited at page 20 of Complainants' brief: "Any schedule that is made available to the public by the marine terminal operator ***shall be enforceable by an appropriate court as an implied contract*** between the marine terminal operator and the party receiving services rendered by the marine terminal operator..." 46 CFR §525.2(a)(2) (emphasis added). Accordingly, by using the Port Authority's facilities, the carriers automatically became bound by the Tariff through an implied contract. *See, e.g., New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal District*, No. 83-2, 1986 WL 170020, at *9 (FMC Sept. 16, 1986) (finding that even in the absence of "direct privity," users of port facilities and essential support services may still be made liable for port tariff fees).

> If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule ***covering those same services*** shall not be enforceable as an implied contract.

Mot. for J. at 20 (quoting 46 C.F.R. § 525.2(a)(3)) (emphasis added).

But the CFC does *not* cover the same services that are provided by the terminal operators. It is not a charge for the stevedoring of cargo containers. *See* SOF ¶¶ 4, 5, 8, 12, 55. Nor do the terminal operators provide the Port Authority's infrastructure and security projects funded by the CFC. *See id.* Rather, the CFC is a charge to recover the Port Authority's costs for infrastructure improvements to the rail, roads, and increased security that provide increased efficiency and security for the movement of cargo containers through the port *after* the cargo containers have been unloaded from the vessels and en route to their final in-land destination (or for outbound cargo containers, *before* they are loaded onto the berthed vessels). *See* SOF ¶ 28.

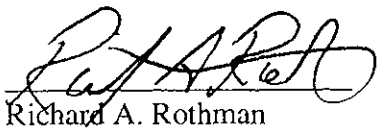
CONCLUSION

In short, Complainants' Motion for Judgment is founded on the specious premise—contrary to plentiful precedent—that the benefits they receive from CFC-funded projects are wholly irrelevant to their claims under § 41102(c) because they supposedly receive no "services." Because Complainants have failed to contest either the existence of the benefits they receive or the evidence that those benefits exceed the CFC-related cost that Complainants incur—while simultaneously blocking the Port Authority's efforts to develop the record more fully through discovery—they have utterly failed to carry their burden of showing that they are entitled to judgment as a matter of law.

For the foregoing reasons, Complainants' Motion for Judgment should be denied.

Dated: February 1, 2013

Respectfully submitted,



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CONFIDENTIAL MATERIALS EXCLUDED

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

Via Federal Express:	Dated at New York, NY this 1st day of February, 2013
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BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 11-12

HANJIN SHIPPING CO., LTD.;
KAWASAKI KISEN KAISHA, LTD.;
NIPPON YUSEN KAISHA;
UNITED ARAB SHIPPING COMPANY (S.A.G.); and
YANG MING MARINE TRANSPORT CORPORATION,

COMPLAINANTS

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

RESPONDENT

OPPOSITION TO COMPLAINANTS' MOTION FOR JUDGMENT

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The Port Authority of New York and New Jersey ("PANYNJ" or the "Port Authority"), by its undersigned attorneys, hereby submits its Opposition to Complainants' Motion for Judgment that Respondent's Cargo Facility Charge Violates 46 U.S.C. § 41102(c) ("Motion for Judgment" or "Mot. for J.").

PRELIMINARY STATEMENT

Complainants' Motion for Judgment asks Your Honor to determine, well before the completion of discovery, whether the Port Authority's Cargo Facility Charge ("CFC") violates 46 U.S.C. § 41102(c), as a matter of law. Complainants argue that the CFC is an unreasonable user fee because the carriers against which the CFC is assessed purportedly do not receive any "services" in connection with any of the CFC-funded projects at the port, which include the ExpressRail, road improvements and increased security. But Complainants' motion is founded upon (1) a fundamental misunderstanding of the law construing § 41102(c); (2) hotly disputed facts, including Complainants' intentional misrepresentation of their role in the movement of cargo through the port and flagrant misstatements regarding the language and operation of the CFC itself; and (3) Complainants' obdurate refusal to provide discovery revealing the benefits that they receive from the CFC-funded projects. Complainants' motion can easily be dismissed on multiple grounds, not the least of which is prematurity, given the myriad of disputed facts requiring examination through the discovery Complainants have withheld.

Initially, and in their Motion for Judgment, Complainants attempted to portray themselves, through clever word play and obstruction of discovery, as mere "vessel operators" whose responsibility for cargo containers ends at the water's edge. *See* Mot. for J. at 1, 15-16, 21. To perpetuate this fiction, Complainants consistently stonewalled discovery aimed at unveiling Complainants' true role as integrated global shipping and logistics enterprises that

coordinate the transportation of cargo from its point of origin, across the ocean, through the port's infrastructure, and inland to its ultimate destination. But more recently, including in briefing several discovery motions following their Motion for Judgment, Complainants have grudgingly begun to abandon their false self-portrayal and now acknowledge, at least generally, that they do receive benefits from CFC-funded projects to an as-yet unspecified extent. *See* Complainants' Opposition to Motion to Compel, dated January 10, 2013 ("Opp. to MTC"), at 2, 4-6 ("Complainants, while fundamentally vessel operators who load, carry and discharge containers, do subcontract the movement of cargo under through bills of lading to and from inland points. Some have affiliates that perform logistics services."); *see also* Mot. for J. at 13 (admitting that Complainants "enjoy some benefit" from CFC-funded projects).

Accordingly, Complainants' argument now rests on the plainly erroneous proposition that irrespective of the fact that Complainants and their logistics subsidiaries receive benefits as a result of the Port Authority's CFC-funded projects, the CFC cannot stand unless it is a fee for a "service" performed by the Port Authority. *See* Mot. for J at 1, 13-16, 20, and 21. Putting aside that any distinction between "services" and "benefits" could be at most metaphysical, the case law Complainants themselves cite is clear that a user fee may be properly assessed for *either* a "service performed" *or* "a benefit conferred" on the entity charged, so long as the "benefit" is roughly commensurate with the amount of the fee. *See infra* at 19-20.

Complainants also skew the actual language of the CFC in an effort to create the false impression that the CFC is enforced through the threat of a blockade on vessels. *See* Mot. for J. at 4, 5, 13-16, 27-28. But the actual language of the CFC (rather than Complainants' mischaracterization of it, which provides misleading substitutes for key words and phrases),

together with the substantial documentation produced by the Port Authority, demonstrates otherwise. *See infra* at 9-10.

Finally, although Complainants have now at least begun to acknowledge that their role in intermodal transportation extends to and through the port's infrastructure to points inland, and that they *do* receive benefits from the projects and activities funded by the CFC, they continue to refuse to provide discovery that is highly relevant to the central issue in this litigation: whether the *extent* of those benefits is roughly commensurate with the amount charged. At the same time, Complainants do not even attempt to demonstrate that the benefits they receive are disproportionately less than the amount of the CFC, nor do they challenge the expert analysis of economists at Compass Lexecon, which confirms that the benefits they receive far outweigh the amount of the CFC. As a result, Complainants must either (1) be precluded from denying that benefits they receive are at least commensurate with their CFC payments or (2) provide the discovery that has long been sought. In either case, Complainants' Motion for Judgment should be denied.

BACKGROUND

A. Development of the Port Authority's Cargo Facility Charge

The Port Authority has undertaken major infrastructure projects at the port for the benefit of the users of the port, including the construction of on-dock rail facilities and substantial improvements to the port's congested roadways. *See* Response to Complainants' "Statement of Facts Not in Dispute" and Port Authority's Statement of Additional Facts, dated Feb. 1, 2013 ("SOF") ¶ 101. In addition, in the wake of the September 11, 2011 terrorist attacks, the Port Authority expended substantial, additional sums for security improvements pursuant to federal mandate. *See* SOF ¶ 106.

The CFC, which went into effect on March 14, 2011, is a user fee assessed on all cargo containers, non-containerized cargo, and vehicles upon discharge or loading onto vessels at the Port Authority's leased and public berths. *See* Tariff at Subrule 34-1200. It is designed to recoup the unrecovered costs of the on-dock rail facilities[1] and certain road improvements,[2] as well as the costs of current enhanced security measures and facilities.[3] *See* SOF ¶¶ 76, 121. Cargo containers are assessed $4.95 per TEU,[4] non-containerized cargo is assessed $0.13 per metric ton, and vehicles are assessed $1.11 each. *See* Tariff at Subrule 34-1210. These rates were derived by spreading the costs to be recovered over the projected cargo traffic for the twenty-five-year period ending in 2035. *See* SOF ¶ 120. Specifically, in calculating the CFC rates, the Port Commerce Department forecast the expected volume of cargo containers, non-containerized cargo, and vehicles over that twenty-five-year period, and apportioned the unrecovered cost of the ExpressRail and the expected costs of the roadway projects, so that the costs of the rail and roadway projects as well as a percentage of the total post 9/11 security

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[1] The CFC is designed to recover, among other things, capital expenditures incurred to construct the ExpressRail infrastructure. *See* SOF ¶ 102.

[2] The important roadway projects funded by the CFC include the expansion of Port Street to increase capacity, adding lanes to McLester Street, softening the North Avenue turn to reduce the high number of traffic accidents, and other measures that "reduce truck idling times and mitigate the attendant negative environmental impact caused by idling." See SOF ¶ 105.

[3] The Port Authority's "incremental post-9-11 security costs," funded in part by the CFC, include more than $125 million invested in seaport security, "to put in place leading-edge technologies such as a closed-circuit system that integrates intelligent video, license plate readers, geospatial data and direct information downlinking," as well as security upgrades necessary to obtain certification in the U.S. Department of Homeland Security's Customs-Trade Partnership Against Terrorism program. *See* SOF ¶¶ 107, 108.

[4] "TEU" stands for "twenty-foot equivalent unit." Containers come in different sizes that are often expressed in TEUs. Most cargo containers are two TEUs and most others are one TEU. The Port Authority assumes that the average ratio of TEUs to containers is 1.7. *See* SOF ¶ 22.

upgrades would be reasonably and fairly assessed on all cargo passing through the port's improved infrastructure. *See* SOF ¶ 121.[5]

The CFC went into effect only after lengthy consideration and careful analysis by the Port Authority Port Commerce Department, which recognized the need to ensure that the contemplated fee would recoup the investment in port improvements in an even-handed manner. *See* SOF ¶ 123. In discussions with the New York Shipping Association, of which each of the Complainants is a member, it was observed that the Port Authority's then-existing Intermodal Container Lift Fee ("Rail Fee") of $57.50 for each container that used the on-dock rail facilities—a fee significantly higher than the CFC's average assessment of $8.42 on all containers[6]—had the detrimental effect of incentivizing carriers to use trucking rather than rail. *See* SOF ¶ 116.[7] This led to greater roadway congestion than would otherwise exist (together with increased costs associated with congestion), and also failed to allocate the costs of the port infrastructure and security improvements fairly among those that benefited from them. *Id.*

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[5] Complainants' assertion that the CFC is a charge for "cargo handling services" is not only disputed, but plainly has no basis in reality. *See* Complainants' Statement of Undisputed Facts ¶ 28; *see also* Mot. for J. at 3, 16. Complainants' only basis for disputing the fact that the CFC pays for infrastructure, intermodal transportation, and security appears to be a misinterpretation of a single written objection that the Port Authority made in response to one of Complainants' document requests. *See* Mot. for J. at 7-8. The Port Authority did indeed note that incoming CFC payments are not "earmarked" to be used on later particular expenditures, but that is because the CFC primarily recoups costs of projects that have already been paid for. Documents produced by the Port Authority in response to Complainants' requests show the Port Authority's infrastructure and security investments in detail, as well as a breakdown showing how the CFC is allocated to recover for the roadway, intermodal, and security improvements. *See* SOF ¶ 91.

[6] Because containers, on average are 1.7 TEUs (*see supra* n.4) and the CFC is $4.95 per TEU, the average cost of the CFC per container is $8.42. SOF ¶ 75.

[7] At the time the CFC was implemented, in addition to the Rail Fee, the Port Authority had also been charging a volume-based annual Container Terminal Subscription Fee (the "Truck Fee") in connection with the SeaLink trucker identification system used for interchange of containers between truckers or trucking companies and container terminals subsequent to unloading from the vessel or before loading onto the vessel. *See* SOF ¶ 115. The Truck Fee, like the Rail Fee, was eliminated as part of the CFC's implementation. *See* SOF ¶ 118.

Accordingly, it was agreed that the Port Authority should consider assessing a fee on all cargo containers moving through the port on an equal basis, because all of them benefit directly from the Port Authority's infrastructure and security investments. *See* SOF ¶ 117.

By the same token, the Port Authority wanted to be sure that, by replacing the Rail Fee and Truck Fee with the CFC on all containers, those carriers that primarily utilized trucks for the inland transportation of the containers would be receiving corresponding benefits. Accordingly, the Port Authority engaged economics experts from Compass Lexecon to study the benefits from the ExpressRail infrastructure projects to carriers primarily utilizing trucks, including the shift of a portion of the inland movement of cargo from truck to rail, and the attendant decrease in roadway congestion and truck waiting time. *See* SOF ¶ 126. The report issued by Compass Lexecon in December 2010—which Complainants have not even attempted to dispute—concluded that the reduced roadway congestion resulting from the ExpressRail infrastructure projects reduced the transportation costs per cargo container transported by truck by far more than the amount of the CFC, and that those benefits were likely to increase further as a result of additional traffic moving to ExpressRail because of the restructuring of the cost recovery fees. *See* SOF ¶ 127 (citing Compass Lexecon Report at 29, which estimated that "the savings [for containers transported by truck] appear to be conservatively in the range of $21.42 to $25.33 per container—substantially larger than the $8.42 per container fee proposed by the [Port Authority]").

The CFC was not developed in a vacuum. After publishing a draft of the Tariff for notice and comment, the Port Authority held numerous meetings with ocean carriers (including Complainants), terminal operators, and others to discuss the proposed Tariff, and provided multiple opportunities for comment that led to certain revisions to the CFC before final

implementation.[8] As can be seen, the CFC was not, contrary to Complainants' suggestion, a sudden knee-jerk reaction to a few carriers' requests that the Port Authority eliminate the Tariff provisions relating to the Rail Fee. *See* Mot. for J. at 9 (positing that the "genesis" of the CFC was the Port Authority's decision to cater to specific carriers). No one, other than the Complainants, has sued the Port Authority challenging the CFC, and, indeed, almost half of the original nine Complainants have dropped out of this case.

B. Implementation of the Cargo Facility Charge

The CFC became effective on March 14, 2011. Its implementing subrules are contained in the Port Authority's Tariff, Section H, Subrules 34-1200 through 34-1220. *See* SOF ¶¶ 18, 19. As described in the Tariff, the CFC is a charge assessed on all cargo containers and non-containerized cargo moving through the Port Authority's marine terminals.[9] It is assessed at the time that the cargo container or non-containerized cargo is loaded onto or unloaded from a vessel at the port. For the cargo containers, the charge is paid by the ocean common carrier responsible for the container, irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. *See* SOF ¶ 28.[10]

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[8] One revision was to require the Port Authority to generate monthly invoices for each individual ocean carrier as opposed to having the terminal operators bill the ocean carriers directly. *See* SOF ¶ 130.

[9] *See* SOF ¶ 19 (citing Tariff, Subrule 34-1200, at 50, which defines "Cargo Subject to Fee" and explains that the CFC applies to "all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths").

[10] The CFC is paid by the "user," which the Tariff defines as the "user of cargo handling services." *See* Tariff at Subrule 34-1220(1)(a). At the Port Authority's private marine terminals, where Complainants' container vessels call exclusively, the only "users of cargo handling services" are the ocean common carriers whose containers and non-containerized cargo are unloaded from or loaded onto vessels. SOF ¶ 26 (citing Declaration of Brian Kobza, dated Feb. 1, 2013 ("Kobza Decl.") ¶ 6). Therefore, for purposes of this motion, the terms "user" and "carrier" are interchangeable.

It is important to distinguish between a "common carrier" and a "vessel," a distinction that Complainants purposefully blur throughout their motion. A common carrier is defined by the Shipping Act, in relevant part, as an entity that (i) holds itself out to the general public as providing transportation by water of cargo; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses a vessel for all or part of that transportation. *See* 46 U.S.C. § 40102(6). In other words, a carrier is the party responsible for arranging and providing the transportation of cargo from, for example, Shanghai to Chicago and vice versa. *See* SOF ¶¶ 133, 134 (citing Kobza Decl. ¶ 17). A vessel, on the other hand, is simply a watercraft used to transport cargo on water. Carriers may move containers on their own vessels or arrange to transport their containers on other carriers' vessels pursuant to a vessel sharing agreement, slot charter or other arrangement. *See* SOF ¶ 132. Conversely, a carrier might transport several other carriers' containers on its own vessels. *Id.* It is the carrier that has contracted and issued a bill of lading for the carriage of the goods, *i.e.*, that is responsible for the particular shipment, not the carrier that happens to own and/or operate the vessel transporting the containers, that is responsible for paying the CFC. *See* SOF ¶ 26. Thus, Complainants' assertion that the CFC is "a terminal tariff charge on vessels" (Mot. for J. at 1) is simply wrong, as is their assertion that the CFC is assessed against "any vessel calling at any terminal" (Mot. for J. at 3).

By placing the obligation to pay the CFC on the carrier that has taken contractual responsibility for the carriage of the goods, the CFC is assessed on the party most directly responsible for the movement of the cargo container from its point of origin, through the port, and onward to its final destination. *See* SOF ¶ 26 (citing Declaration of Peter Zantal, dated Feb. 1, 2013 ("Zantal Decl.") ¶ 37). Carriers contract directly (or through their own subsidiaries) with

all the other major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. Complainants' and other carriers' position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC themselves or to further allocate it to others in the chain as they see fit. *See* SOF ¶ 147 (citing Kobza Decl. ¶ 17). In addition, by triggering the obligation to pay the CFC at the point when the cargo containers are unloaded from or loaded onto vessels at the port, the Port Authority ensures that all cargo containers bear their fair share, *see* SOF ¶ 141, and also can make efficient use of the existing administrative structure already in place at the marine terminals to account for each cargo container and collect the fee.[11] *See* SOF ¶ 144. By collecting the CFC in this manner, the Port Authority can avoid the need to charge a higher CFC rate to cover the higher administrative costs of a less efficient system. *See* SOF ¶ 145.

C. Enforcement of the CFC

If a carrier does not pay the invoiced CFC charges for two consecutive reporting periods (a "non-compliant carrier"), the practice of the Port Authority is to contact both the non-compliant carrier and each private terminal operator to remind them of the outstanding balance. *See* SOF ¶ 37 (citing Zantal Decl. ¶ 38). If the balance remains unpaid, the Tariff authorizes the Port Authority to issue a directive requiring each terminal operator either to cease service to the

[11] The terminal operators—which already had a process in place for invoicing and collecting fees from the carriers when the CFC became effective—send a monthly Vessel Activity Report ("Report") to the Port Authority detailing each carrier's activity at their terminals that is subject to the CFC. *See* SOF ¶ 32. Monthly invoices are then issued by the Port Authority to private marine terminal operators for each of the carriers calling at that terminal based on the prior month's Report. *See* SOF ¶ 34; Tariff, Section H, Subrule 34-1220, 3(b)(i). The terminal operator then collects the CFC from each carrier incurring the charge and forwards the payments to the Port Authority. *See* SOF ¶ 30. Some carriers have chosen to pay the CFC directly to the Port Authority. *See* SOF ¶ 31.

non-compliant carrier or to take financial responsibility itself for payment of that carrier's CFC charges. Tariff, Section H, Subrule 34-1220, 3(b)(iii). Thus, a non-compliant carrier's cargo containers may still be moved through the port where a terminal operator accepts financial responsibility for paying the CFC on the non-compliant carrier's behalf. *See* SOF ¶ 37.

Only a non-compliant carrier, ***but not a vessel***, risks being unable to move its cargo containers through the port by failing to pay the CFC. *See* SOF ¶ 37. For example, a vessel owned by a non-compliant carrier is permitted in the port to load and unload the containers of any compliant carrier that are transported on the vessel. *See id.* Likewise, a vessel owned by a compliant carrier that is transporting containers of both compliant and non-complaint carriers is also permitted in the port and can discharge and load the containers of any compliant carrier. *See id.* But in any of these circumstances, the vessel itself is allowed to berth at the port. *See id.*[12]

D. The Complainants

Complainants are all ocean common carriers within the meaning of the Shipping Act, 46 U.S.C. § 40102(6). *See* SOF ¶ 1; Compl. ¶ III.B. Accordingly, while one aspect of Complainants' business enterprise is the operation of vessels, *see* SOF ¶ 1, their business is not so limited, as Complainants have now grudgingly begun to admit. *See* Opp. to MTC, at 4. Rather, as discussed further below, Complainants are highly integrated global shipping and logistics companies that coordinate the transportation of cargo not only from its point of origin across the ocean, but also through the port's infrastructure and inland to its ultimate destination. *See infra* at 15-16. Indeed, like other carriers, Complainants almost always either own or lease the cargo containers against which the CFC is charged. *See* SOF ¶ 133.

[12] Thus, Complainants' assertion that the CFC is enforced by threat of a "blockade" on vessels is simply false. *See* Mot. for J. at 4-5.

E. Procedural History

Complainants initiated this proceeding on August 5, 2011, by filing a Complaint for Cease and Desist Order and Reparations, seeking redress for alleged violations of the Shipping Act, 46 U.S.C. §§ 41102(c) and 41106(2). Compl. ¶ III.C. Evidently recognizing the futility of their discrimination claim under 46 U.S.C. § 41106(2), Complainants subsequently dropped that claim. *See infra* n. 26. Complainants' only remaining claim for relief is that the CFC violates 46 U.S.C. § 41102(c), because the amounts Complainants pay under the CFC are purportedly not commensurate with the benefits they receive from projects funded by the CFC. *See generally* Motion for J.; *see also* Compl. ¶ V (arguing that that the Port Authority's "adoption, application, implementation and enforcement of [the Cargo Facility Charge amounts to an] unlawful exaction of fees not commensurate with services provided").[13]

Over the past year, four of the nine Complainants have withdrawn from this case. Motions to Withdraw, dated October 25, 2011 (China Shipping), August 2, 2012 (Horizon), and November 16, 2012 (Cosco and Evergreen).[14]

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[13] Complainants previously moved for partial summary judgment in January 2012 on the unpleaded assertion that the CFC by its terms does not apply to empty cargo containers. *See generally* Complainants' Motion for Partial Judgment, filed Jan. 11, 2012. Complainants' motion, which was premised on nothing more than misguided wordplay, ignored the express language of the CFC, which states that it applies to "all cargo containers" without regard to whether the cargo containers are full, partially full, or empty. *See generally* PA Response to Motion for Judgment, dated Jan. 26, 2012. That motion remains pending.

[14] Complainants' original counsel, Manelli Selter also withdrew from this litigation in May 2012, just weeks after the Port Authority moved to disqualify George Quadrino and that firm due to Mr. Quadrino's prior involvement in this litigation while himself working for the FMC. *See* Motion to Withdraw from Representation, dated May 15, 2012. The law firm that replaced the Manelli firm, Cichanowicz, Callan, Keane Vengrow & Textor LLP has now also moved to withdraw from representing Complainants in this litigation due to REDACTED REDACTED. *See* Declaration of Reed Collins, dated Feb. 1, 2013, ("Collins Decl.") ¶ 23, Ex. V (e-mail from Cichanowicz firm to Port Authority's counsel).

F. Complainants' Obstruction of Discovery

Since September 1, 2011, the Port Authority has diligently sought discovery into Complainants' logistics operations at the port in order to probe Complainants' actual role in the movement of cargo containers through the port as well as the central issue in this litigation, *i.e.*, the extent to which Complainants are thereby benefited by the rail, road, and security projects funded by the CFC. Based on the initial Complaint, which absurdly alleged that Complainants received "nothing" in return for paying the CFC (Compl. ¶ IV.BB)—a position abandoned in Complainants' current motion papers[15]—the Port Authority served discovery requests concerning the actual extent to which Complainants do, in fact, utilize and benefit from the port infrastructure and security improvements that are funded by the CFC. Despite the clear relevance of this discovery to the allegations of the Complaint (and the Motion for Judgment), Complainants have either flatly refused to comply with their discovery obligations or sought to block that discovery by one means or another at every turn.

Complainants' obstructions already have been detailed in the submissions currently pending before Your Honor concerning several discovery disputes. *See generally* Letter dated Dec. 20, 2012, responding to Complainants' request to stay discovery; Motion to Compel Production of Contracts, dated Jan. 3, 2013 ("Mot. to Compel"); Opposition to Omnibus Motion to Quash, dated Jan. 3, 2013 ("Opp. to MTQ"); Opposition to Complainants' Motion for Protective Order, dated Jan. 11, 2013 ("Opp. to MPO"). The Port Authority will not repeat the arguments set forth in those submissions, but will note here that Complainants' dilatory tactics have prevented the Port Authority from discovering highly relevant evidence regarding the extent to which Complainants benefit from the infrastructure, intermodal transportation, and

[15] *See supra* at 14-16.

security services funded by the CFC, given Complainants' central role in the movement of cargo through the port. Such evidence includes, but is not limited to:

- The economic terms on which Complainants provide transportation of cargo containers through port infrastructure and further inland, as reflected in Complainants' contracts with beneficial cargo owners;[16]
- The economic terms on which Complainants arrange or provide transportation of cargo containers via the rail and roadway projects funded by the CFC, as reflected in their contracts with rail and motor carriers;[17]
- Whether Complainants provide the above services (and hence use CFC-funded infrastructure) on their own or through their subsidiaries, as reflected in their corporate arrangements with subsidiary logistics companies;
- Complainants' actual costs to transport cargo containers to or from the Port of New York and New Jersey by rail and by truck.

See generally Rule 56(d) Declaration of Jared R. Friedmann, dated Feb. 1, 2013 ("56(d) Decl.") (citing Fed. R. Civ. P. 56(d)).

The Port Authority expects that the discovery being withheld by Complainants and their logistics subsidiaries will further confirm that the cost of the CFC is not merely commensurate with, but easily outweighed by, the benefits Complainants receive from CFC-funded projects and services, as set forth in the unchallenged report by Compass Lexecon, dated December 12, 2010 as well as the Supplemental Declaration of Frederick Flyer and Allan Shampine, dated January 31, 2013 ("Flyer/Shampine Supp. Decl.") ¶ 8 ("[T]he substantial benefits the carriers receive from the ExpressRail system alone exceed the fees imposed on them through the CFC."). But, as

[16] The cost structure of Complainants' arrangements with cargo owners affects the amount of the benefits they gain from port efficiencies. Complainants may well earn more money for moving more containers or moving them more quickly due to CFC-funded improved infrastructure than any cost they incur due to the CFC, particularly if they are able to pass some or all of such costs on to their customers.

[17] For example, if a Complainant pays a motor carrier a roadway congestion surcharge, then to the extent that either the ExpressRail or the roadway expansion projects funded by the CFC reduce such congestion, Complainants would directly benefit.

reflected in the several discovery motions already pending before Your Honor, Complainants have steadfastly resisted such discovery, doubtless because compliance would unmask the full extent of the benefits they receive as well as the spuriousness of both their Motion for Judgment and their entire position in this litigation.[18] *See generally* 56(d) Decl.

G. The Motion for Judgment and Complainants' Subsequent Admissions

On December 6, 2012, Complainants submitted their Motion for Judgment, in which they settled upon their rather peculiar theory of the case: that the CFC is unreasonable because they do not benefit in *any* direct or meaningful way from the port projects and activities funded by the CFC. *See* Mot. for J. at 1, 15-16, 21. Their motion was based on the now-abandoned contention that Complainants are mere "vessel operators" whose responsibility for containers and cargo ends at the water's edge, and that they therefore have no financial interest in improvements to port infrastructure and security. *See id.* at 23 ("But, the CFC cannot be dropped wholly on the shoulders of vessel operators who do not feel discernible impact any different from that of lessee terminals or cargo interests."); *see also* Compl. § IV, ¶¶ V, X, BB ("Complainants generally do not use the system for the interchange of containers between trucks and container terminals . . because the movement of containers beyond the terminals by truck usually is not within the Complainants' terms of carriage" and "Complainants generally do not use the ExpressRail system" and therefore "will pay millions in CFC payments ***for nothing***") (emphasis added). While Complainants vaguely conceded in their motion that they might receive "some benefit,"

[18] While Complainants have interjected vague, boilerplate objections that providing the requested discovery would be too burdensome, they have never even attempted to spell out the nature and extent of the supposed burden as is required to sustain such objections. *See, e.g., Miller v. Holzmann*, 240 F.R.D. 1, 3 (D.D.C. 2006) ("Like every other judge, I will not consider the objection that an interrogatory is overbroad and burdensome without a showing by affidavit why it is overbroad and burdensome.").

they seem to suggest that any benefit was entirely general or indirect, or for the "common good," or somehow otherwise meaningless. Mot. for J. at 13.

Of course, Complainants' argument purposefully ignored the way Complainants actually do business, as they have finally, if grudgingly, begun to acknowledge in opposing the Port Authority's efforts to compel discovery of Complainants' subsidiary logistics companies as well as of Complainants' agreements with cargo owners, rail carriers, and motor carriers—all of which the Port Authority anticipated would help expose Complainants' key role in moving cargo through the port's infrastructure. *See generally* Opp. to MTQ; Mot. to Compel. Accordingly, Complainants finally admitted *some* of what the Port Authority has always believed: that Complainants do, in fact, provide "intermodal through transportation of containerized cargo"; "subcontract the movement of cargo under through bills of lading to and from inland points" via rail and truck; "have affiliates that perform logistics services"; and that their operations at the port and globally include the provision of intermodal transportation and other logistics services. *See* Opp to MTC at 4-6. In other words, contrary to the nonsense upon which their Motion for Judgment was based—that Complainants are simple "vessel operators" and "not 'users' of the Port's cargo services in their containerized cargo operations" (*see* Mot. for J. at 17, 20, 23)—Complainants are in fact highly integrated global shipping and logistics companies that coordinate the transportation of cargo not only from its point of origin and across the ocean, but through the port's infrastructure and then inland to its ultimate destination. *See* Opp. to MTC at 4-6 As such, Complainants stand at the very center of the economic and logistical transport chain in which shippers, carriers, intermediaries, trucking companies, and rail carriers move cargo through the Port of New York and New Jersey. *See* SOF ¶ 152. This is consistent with

what Complainants say on their own websites, that they have "comprehensive logistics services," which "connect[ ] every city via major ports" via "rail, truck and feeder." SOF ¶¶ 135, 136.

Complainants, while conceding that they in fact benefit from these CFC-funded projects, at the same time also oddly note that they do not challenge the extent of the benefits they receive. *See* Mot. for J. at 13 (conceding that Complainants "enjoy some benefit" and "are not going to argue the point" that they benefit); *id.* at 14 (arguing that their benefits are "inherently impossible to measure"); Motion for Protective Order, dated Jan. 4, 2013, at 3 (cavalierly stating that "Complainants have no intention of engaging in a pillow-fight between 'experts'" over benefits received). Indeed, Complainants do not even attempt to address the Compass Lexecon Report of December 2010, which concluded, following a detailed expert economic analysis, that the benefits conferred on Complainants and other carriers by CFC-funded infrastructure projects exceed the CFC's cost. *See supra* at 6, 13; *see also* Flyer/Shampine Supp. Decl. ¶ 12 (concluding that the benefits to Complainants are "well in excess of the level of the CFC").

As a result of Complainants' concessions, it is patent that their business operations *directly benefit* from efficiencies gained through the improvements in safety, port infrastructure, and intermodal transportation, all of which are funded by the CFC. All that remains of their attack on the benefits of the CFC is, as discussed below, the spurious contention that those benefits are wholly irrelevant under § 41102(c). *See infra* at 18-25.

ARGUMENT

I. Summary Judgment Standards and Procedure

The Commission has made clear that summary judgment is an "extreme remedy" that is not favored, and is appropriate only where the pleadings and record show "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing

law." *See McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line*, 27 SRR 1045, 1052 (FMC June 23, 1997) (internal citations omitted).

The burden of demonstrating that summary judgment is appropriate lies with the movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *accord Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, No. 08-03, at 4-5 (FMC Jan. 31, 2013). "[A]ny doubt as to the existence of a genuine issue of material fact will be resolved against the movant." *McKenna Trucking Co., Inc.*, 27 SRR at 1051 (*quoting* 10A Wright, Miller and Kane, *Federal Practice and Procedure*, Section 2727 at 121-129).

When a party shows that it "cannot present facts essential to justify its opposition," a court may deny the motion for summary judgment, or defer considering the motion to allow time for further discovery. Fed. R. Civ. P. 56(d). Summary judgment is especially inappropriate when, as here, discovery is still in its infancy and pertinent discovery requests are outstanding. *See, e.g., The Apple iPod iTunes Anti-Trust Litig.*, Nos. C 05-00037JW & C 07-06507JW, 2010 WL 2629907, at *1, *9 (N.D. Cal. Jun. 29, 2010) ("In general, summary judgment should not be granted while pertinent discovery requests are outstanding . . ."); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp 2d 838, 845 (N.D. Cal. 2004) (summary judgment should not be granted where the opponent "identifies relevant information to be discovered, and there is some basis for believing that such information actually exists"); *Int'l Freight Forwarders & Custom Brokers Assoc. of New Orleans, Inc. v. LASSA*, 27 SRR 392, 394 (FMC Nov. 30, 1995) (finding that the case was

"ill suited to summary disposition" where one party had not had a fair opportunity to develop facts necessary to support its position).

As discussed below, not only do Complainants misconstrue or wholly ignore the applicable law, but also there are myriad disputes of material fact that preclude summary judgment in their favor. Indeed, Complainants' motion for summary judgment is clearly premature and inappropriate not only because discovery is still in its early stages, but also particularly because Complainants have stonewalled discovery to hide information that would be detrimental to their litigation position.

II. Complainants' Admissions About the Benefits They Receive From the CFC Preclude Any Determination That They Are Entitled to Judgment As a Matter of Law

The Shipping Act provides that a marine terminal operator (such as the Port Authority) may not "fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).[19] A charge levied by a marine terminal operator is "just and reasonable" for purposes of section 41102(c) if it is "reasonably related to an actual service performed *or* a benefit conferred on the person charged." *West Gulf Maritime Assoc. v. Port of Houston*, 18 SRR 783, 790 n. 14 (FMC Aug. 16, 1978) ("WGMA I") (emphasis added). Accordingly, when deciding claims under § 41102(c), courts consider whether the charge is reasonably proportionate to the services *or* benefits provided to the person paying the charge. *See Volkswagenwerk Aktiengesell-Schaft v. FMC*, 390 US 261, 282 (1968) ("The question under § 17 is . . . whether the correlation of [the] benefit to the charges imposed is reasonable."). Thus, evaluating the legality of the CFC under § 41102(c) requires a comparison between the amount charged and the extent of the

[19] Section 41102(c) is the recodification of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. App. 1709(d)(1). The same requirement was carried forward from section 17 of the Shipping Act of 1916, 46 U.S.C. App. 816.

benefits that Complainants receive from the infrastructure, intermodal transportation, and security projects funded by the CFC. *See id.* at 281-82; *Baton Rouge Marine Contractors, Inc. v. Fed. Maritime Comm'n*, 655 F.2d 1210, 1217 (D.C. Cir. 1981) (cited by Complainants, and holding that *Volkswagenwerk* requires the FMC to undertake a "comparative evaluation of relative benefits").

Neither the FMC nor the courts require that the amount of the charge be *precisely* linked to the services and/or benefits provided. *See, e.g., Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 FMB 415, 419 (FMB Aug. 4, 1961) (recognizing that at times there "can be no precise equivalence between services rendered and the charges"); *see also Volkswagenwerk*, 390 U.S. at 281 (finding that "a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under § 17 of the Shipping Act, even though not all members of the group receive equal benefits"). The standard merely requires that the charge reflect "the reasonable cost and value of services and facilities which it can and does make available and which are for the benefit of the vessel." *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 FMC 155, 161 (Dec. 2, 1965).

A. Complainants' Spurious "Services" Argument

As noted above, Complainants have fully retreated from any argument that they do not benefit from the infrastructure improvements, intermodal transportation, and additional security funded by the CFC. *See supra* at 14-16. Recognizing that their status as beneficiaries of the CFC is inescapable, Complainants have tried to invent a requirement—found nowhere in the law and indeed contradicted by the very cases they cite—that even where benefits are conferred and received, a charge cannot stand unless a "service" is also provided in exchange. *See* Mot. for J. at 1, 13-14, 15-16, 20, and 21. This is simply wrong. As the cases cited above and in

Complainants' own motion plainly confirm (*see* Mot. for J. at 21), Complainants may properly be charged a user fee for ***either*** a "service performed" ***or*** a "benefit conferred." *See WGMA I*, 18 SRR at 790 n.14 (stating that charges must be reasonably related to "an actual service performed ***or a benefit conferred*** on the person charged") (emphasis added); *Volkswagenwerk*, 390 U.S. at 282 (holding that the question is whether "the correlation of [the] ***benefit*** to the charges imposed is reasonable") (emphasis added).

Complainants' artificial focus on "services" (to the exclusion of "benefits") is directly contravened by *Indiana Port Commission v. Bethlehem Steel Corp.*, 521 F.2d 281 (D.C. Cir. 1975). In *Indiana Port Commission*, the IPC paid to construct both a harbor and a public terminal facility and then sought to recoup its expenditures by assessing a tariff on all "vessels entering the Harbor." *Id.* at 281. Although the FMC had determined that the IPC provided no "services" to vessels using the harbor, and the Court of Appeals agreed that no "service" performed by the IPC was sufficient to justify the tariff under the Shipping Act, the Court of Appeals was unable to reach the same conclusion with respect to "benefits." As the court held in reversing and remanding to the Commission, the IPC could be said to confer identifiable benefits through its investment in the harbor itself. *Id* at 287. And a proper analysis of those benefits, even in the absence of "services" performed by the IPC, could justify the IPC's tariff. *Id.* Thus, in evaluating a charge under § 41102(c), the question is whether the charge is reasonably related to either the services ***or*** benefits provided. [20] Were the law otherwise, the Commission would

[20] *See also Evans Cooperage Co., Inc.*, 6 FMB at 418-419 (rejecting claim that "charges are unreasonable because no specific service is rendered to the complainant" and upholding charge to defray facility costs, which included access to fire tug, police, and mooring facilities adequate for Complainant's barge); *West Gulf Ass'n v. Port of Houston Authority*, 18 S.R.R. 783, 790 (FMC Aug. 16, 1978) (finding that charges against users were reasonable, and stating that "[t]here is no question that vessel owners, agents, and cargo interests are 'users' of the terminal

find itself in the business of attempting to draw meaningless distinctions between benefits that are based on "services" and those that are not.

Indeed, as long as appropriate benefits are conferred, fees need not be used to pay for individualized services but rather may be used to recover the cost of improvements to port facilities, or to fund port-wide services that enhance the safety of the port generally. *See West Gulf Ass'n v. Port of Houston Authority*, 22 FMC 420, 425 (FMC 1980) (holding that respondents were empowered to prescribe fees and charges to be collected for use of their land improvements and facilities); *Evans Cooperage*, 6 FMB at 418-419 (upholding charge to defray facility costs, which included access to fire tug, police, and mooring facilities adequate for Complainant's barge). The Port Authority's use of the CFC to fund the rail and roadway infrastructure that Complainants use, as well as security services that protect Complainants' cargo, is thus well within the bounds of established precedent.

B. The Benefits That Complainants Admittedly Receive From CFC-Funded Projects Are Sufficient to Uphold the CFC Under § 41102(c)

Because Complainants concede that they benefit from these CFC-funded projects, only the *extent* of that benefit, and whether the amount charged is reasonably proportionate, remain to be decided. *See supra* at 14-16, 18-19. But Complainants have not even attempted to show that the benefits they receive are not commensurate with the charge. Quite the contrary, Complainants expressly disclaim any intention of mounting their own challenge to the amount of benefits they receive, at least for purposes of their Motion for Judgment *See supra* at 16

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facilities"—even if they do not directly use the facility—because they "derive a benefit therefrom").

Meanwhile, the Port Authority has submitted its own evidence—totally unchallenged by Complainants—that the benefits to Complainants are quite substantial and easily outweigh the cost of the CFC. For example:

- The Port Authority's construction of the on-dock ExpressRail (also funded by the CFC) has improved the efficiency with which Complainants can transport cargo containers through and beyond the port by rail, eliminating the extra step of transporting cargo containers from the dock to the off-port railway. SOF ¶ 160.

- The availability of ExpressRail, together with the expansion of the port's roadway capacity, reduces congestion on port roadways, thereby reducing Complainants' costs to move cargo containers by truck. SOF ¶ 161.

- The Port Authority's roadway projects, including widening certain areas, has reduced accidents which are costly not only to those directly involved, but also to other port users because of the traffic and congestion they create. SOF ¶ 162.

- The additional port security funded by the CFC reduces not only the risk of damage to Complainants' property (including their cargo containers), but also the risk of costly theft or sabotage of cargo, for which Complainants may become responsible to their customers. SOF ¶ 159

Indeed, before instituting the CFC, the Port Authority engaged outside expert economists, who determined that the expected savings to carriers from reduced truck congestion *alone* would more than offset the amount of the CFC. *See supra* at 6, 13 (discussing Compass Lexecon Report). Compass Lexecon's Supplemental Declaration further confirms that "the carriers receive economic benefits, some of which we have quantified in our prior declaration, from the ExpressRail system, roadway improvements and security enhancements funded by the CFC." SOF ¶ 164 (quoting Flyer/Shampine Supp. Decl. ¶ 8). Specifically, Compass Lexecon concluded that carriers benefit from ExpressRail when they arrange container moves through the port via truck, because the reduced costs associated with expedited travel times through the port exceed the fee imposed by the CFC. SOF ¶ 165.[21] Moreover, the estimated cost reduction of

[21] Because the trucking industry is highly competitive, Compass Lexecon concluded that any savings experienced by truckers would be passed on to those engaging trucking services, *i.e.* the

$21 to $25 per container was conservative because it measured only *some* of the benefits from only *some* of the projects and services funded by the CFC:

> Our estimates of the amount of benefits received in connection with the CFC-funded projects and activities are conservative because our prior declaration looked at only part of the benefits (excluding, for example, the benefits from reducing the number of accidents) and because the CFC as implemented subsequent to our prior declaration funds a broader range of projects than just ExpressRail, including direct road improvements and security enhancements. We understand that the roadway infrastructure improvements, which also are associated with the CFC, are specifically intended to provide further reductions in congestion, travel time and truck idling time. Therefore, these improvements further increase the total benefits flowing from the CFC beyond those estimated in our prior declaration, which were already well in excess of the level of the CFC.

SOF ¶ 167 (quoting Flyer/Shampine Supp. Decl. ¶ 12). In sum, Compass Lexecon concluded that the ExpressRail system and roadway infrastructure projects funded by the CFC provide transportation efficiencies at the port, which provide direct and quantifiable economic benefits to the carriers, including Complainants, that are "well in excess of the level of the CFC." *Id.* ¶ 168 (quoting Flyer/Shampine Supp. Decl. ¶ 12).

Given the Port Authority's unchallenged evidence that the benefits of the CFC to carriers, such as Complainants, far outweigh the costs,[22] Complainants cannot possibly be entitled to a

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carriers. SOF ¶ 166 (citing Flyer/Shampine Supp. Decl. ¶ 12). Furthermore, even in instances where the cargo owner, rather than the carrier, engages the trucking services, the reduction in trucking costs nonetheless benefits carriers by allowing them to increase their pricing (including passing through the full amount of the CFC), while still offering a lower total cost to the cargo owner than would exist in the absence of the infrastructure improvements. *Id.* (citing Flyer/Shampine Supp. Decl. ¶¶ 13-14)

[22] We also note that the evidence as to the reasonable relationship between the CFC and the cost of the projects it funds is likewise undisputed. Complainants do not dispute that the amount of the CFC reflects the cost to the Port Authority of the projects and activities which benefit Complainants. *See, e.g.*, *WGMA I*, 18 SRR at 790 ("A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service."). As set forth above at pages 3-6, the CFC rates were

contrary judgment as a matter of law. At the very least, there are genuine disputes of material fact,[23] which for purposes of this motion must be resolved against the movant. *See supra* at 17 (citing *McKenna Trucking Co., Inc.*, 27 SRR at 1051).

Moreover, the Port Authority managed to make this demonstration despite Complainants' stonewalling of the very discovery that was designed to paint a far clearer picture of the benefits they receive from CFC-funded projects and services. *See supra* at 12-14. Complainants' concealment of their corporate and financial relationships with their subsidiary logistics companies, as well as the economic terms of their arrangements with cargo owners and rail and motor carriers, has stymied the Port Authority's efforts to portray those benefits with evidentiary detail. *See* SOF ¶ 1 (citing Kobza Decl. ¶ 15). By the same token, these discovery violations have deprived Your Honor of a more complete evidentiary record upon which to evaluate the impact of the CFC on Complainants' businesses. *Cf. Baton Rouge*, 655 F.2d at 1217 (vacating and remanding the FMC's ruling because the Commission, in evaluating a charge for use of an automated shipping gallery, "ignore[d] evidence concerning the impact of automation on stevedore prices and profits").[24] Thus, not only have Complainants failed to challenge the Port

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determined through extensive analysis by the Port Commerce Department and were calculated to specifically recover the unamortized costs of the ExpressRail and roadway projects, and to cover a percentage of the post-9/11 security upgrades at the port.

[23] Indeed, Complainants' motion is replete not only with sharply disputed material facts, but also with outright falsehoods concerning the operation of the CFC itself. *See supra* at 5, 7-10 & notes 5, 12.

[24] Complainants devote considerable space in their brief to *Baton Rouge* as well as two other decisions that supposedly help them because the fee at issue was ultimately struck down under § 41102(c) or its predecessors. *See* Motion for J. at 22-26 (citing *Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 SRR 1123 (FMC July 30, 1997) and *Dreyfus v. Plaquemines Port Harbor & Terminal Dist.*, 21 SRR 219 (FMC Nov. 17, 1981)). But what *Baton Rouge* and the other two cases show is that challenging a fee under § 41102(c) requires a more extensive factual record than exists here, where discovery is still in its infancy. *See Flanagan*, 27 SRR at 1131 (examining, for example, contract produced in discovery to determine the actual scope of the parties' respective responsibilities for cargo, in order to evaluate benefits

Authority's evidence, but their refusal to produce highly relevant information in discovery, as detailed in the accompanying 56(d) Declaration, alone warrants denial of their Motion for Judgment under Rule 56(d). *See supra* at 17-18. Complainants cannot prevail on a motion for summary judgment by withholding the very evidence that would help defeat it.

C. Complainants Are Not "Unlawfully Singled Out" To Pay the CFC

To the extent Complainants intend to argue that they are "unlawfully singled out to pay the CFC" (Opp. to MTC at 1), that argument fails as well. To begin with, the Port Authority fairly allocates the CFC across all cargo containers by charging containers of equal size an equal rate. Because the cost of the CFC is $4.95 per TEU for cargo containers, the amount that any carrier pays is directly proportional to the number and size of containers that the carrier moves through the port. Thus, the only remaining question is whether carriers—as opposed to cargo owners, rail carriers, motor carriers, or any of the other players that have some role in the transportation of cargo from point to point— are at the appropriate point in the chain at which to assess the CFC.

In that regard, the Commission has previously upheld the practice of collecting fees through "the party who can most efficiently effectuate and enforce the same." *WGMA I*, 18 SRR at 790 (noting that, by allocating fees based on efficiency concerns, problems determining responsible parties were eliminated, and the volume and costs of invoicing wharfage charges

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to different parties); *see generally Dreyfus*, 21 SRR 219 (49-page opinion detailing third-party contracts, the extent of complainant's port use, and voluminous other evidence in determining whether harbor fees reasonably related to benefits conferred by the port) In any event, as discussed above, Complainants already admit that, unlike in the cited cases, Complainants *do* benefit from their use of the infrastructure, intermodal transportation, and security improvements funded by the CFC. *See supra* at 15-16; *cf. Dreyfus*, 21 SRR at 258 (finding, by contrast, that complainant did not benefit from the services at issue because "a shipment of grain owned by Dreyfus is never attended by the coroner, conveyed to a hospital in a parish ambulance, etc., and it is assessed 10 cents a net ton for services it has not received").

were drastically reduced). This practice has been found to be reasonable and to "promote overall port efficiency" as it ensures that all revenues due to the port are collected by extending liability for the tariff to "parties over whom the port has the highest degree of collection leverage." *Id.*; *see also Palmetto Shipping & Stevedoring Co., Inc. v. Georgia Ports Authority*, 24 SRR 761, 765 (FMC Jan. 29, 1988) (the "relevant inquiry would appear to be who has the better ability to require advance security from ... principals").

Here, the carriers are the most appropriate parties to be charged the CFC because of the nature of their businesses and their central role in the movement of cargo containers through the port and beyond. As discussed above, the carriers stand at the center of the logistical transport chain in which shippers, carriers, intermediaries, trucking companies, and rail carriers move cargo through the port. *See supra* at 15-16. They coordinate point-to-point transportation by negotiating directly (or through their own subsidiaries) with all the major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. *See id.*; SOF ¶ 146 (citing Kobza Decl. ¶ 14). Indeed, in many instances, Complainants and their own subsidiaries *are* those major players. *See supra at* 15-16 (detailing Complainants' admissions about their subsidiaries' provision of intermodal transportation and logistics services at the port). Complainants' position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC themselves or to further allocate it to others in the chain as they see fit, by adjusting the rates they charge their own customers or the amounts they pay to rail and motor carriers for inland transport.[25]

[25] Carriers can and routinely do pass through their costs to the BCOs and other stakeholders. For example, Hanjin and Yang Ming have recently levied "congestion" surcharges on their

Additionally, as noted above, by charging the CFC to the carriers and billing through the MTOs, the Port Authority incurs only nominal administrative costs, thus avoiding the need to charge a higher CFC rate to cover such costs. *See* SOF ¶ 145. Adopting Complainants' suggestion that the CFC should be charged to others instead, such as the beneficial cargo owners ("BCOs") (*see* Mot. for J. at 11), would likely result in hit-and-miss or unequal assessment of the CFC, and at a minimum, would sharply raise the administrative costs (and with them, the amount of the CFC). For example, in order to collect the CFC from the tens of thousands of BCOs that use the port, millions of additional dollars would have to be invested in infrastructure improvements necessary to create a system of collection, and then significant additional sums would be required to implement, maintain, and enforce the system. *See* SOF ¶ 145. And even if such a program could be fully and fairly implemented, a full roll-out could take years. *See id.*[26]

III. The Carriers' Various Other Contentions Are Either Legally Groundless or Based on Misrepresentations of the Facts

Complainants contend that even though they do not challenge the amount of benefits they receive from CFC-funded projects, the CFC purportedly fails § 41102(c) for various other reasons. These arguments have no basis in either law or fact.

First, Complainants argue that the CFC is inapplicable at the container terminals where the carriers' vessels are served because the Tariff "includes an exception for leased premises."

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customers as compensation for slowdowns at American ports. *See* SOF ¶ 155. REDACTED [redacted] s. *See* SOF ¶ 154.

[26] Even if other classes of port users also benefit from CFC-funded projects and services, Complainants have *expressly waived* any possible claim that the CFC discriminates against ocean carriers under 46 U.S.C. § 41106. *See* Declaration of Jared R. Friedmann dated Jan. 11, 2013 ("Friedmann Decl."), Ex. C, at 2 (letter dated Oct. 2, 2012 from Complainants' counsel to Port Authority's counsel, copying FMC Secretary, announcing intention to withdraw claims under § 41106), Mot. for J. at 1 (requesting a limited ruling only on claims under § 41102(c); Motion for Protective Order, dated Jan. 4, 2013, at 2 (stating Complainants will "conduct their case in accordance with their significantly narrowed theory of the case and the facts presented in their Motion [for Judgment]").

Mot. for J. at 17 (citing Tariff Subrule 34-090). But the exception in Subrule 34-090 upon which Complainants rely refutes Complainants' contention by its own terms. The very sentence of Subrule 34-090 emphasized in Complainants' motion states that this exception to the Tariff applies "*unless* provision is made in the lease for application of said Rules and Regulations for leased premises." And because the leases issued by the Port Authority routinely include exactly such a provision requiring the application of the Rules and Regulations at the leased premises, the Tariff is fully applicable at the leased premises where the carriers' cargo is loaded or unloaded. *See* SOF ¶¶ 59, 61 (citing leases).

Next, Complainants argue that because they have a contractual relationship with MTOs for the provision of services at the port (*i.e.*, for berthing and stevedoring), the Port Authority is somehow precluded from applying the CFC to the carriers. *See* Mot. for J. at 17-20. This is a complete *non sequitur*. The fact that Complainants have "actual contracts" with MTOs (*i.e.*, terminal lessees) at leased premises in no way precludes the applicability of the Port Authority's publicly available Tariff to the carriers though an implied contract.[27] Complainants' argument is based on the patently false and, indeed, absurd premise that the MTOs with which the carriers have actual contracts provide the "same services" to the carriers as the infrastructure improvements and security services covered by the Tariff:

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[27] Complainants are in privity with the Port Authority through implied contracts. Per the very regulations of the Shipping Act cited at page 20 of Complainants' brief: "Any schedule that is made available to the public by the marine terminal operator ***shall be enforceable by an appropriate court as an implied contract*** between the marine terminal operator and the party receiving services rendered by the marine terminal operator..." 46 CFR §525.2(a)(2) (emphasis added). Accordingly, by using the Port Authority's facilities, the carriers automatically became bound by the Tariff through an implied contract. *See, e.g., New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal District*, No. 83-2, 1986 WL 170020, at *9 (FMC Sept. 16, 1986) (finding that even in the absence of "direct privity," users of port facilities and essential support services may still be made liable for port tariff fees).

> If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule ***covering those same services*** shall not be enforceable as an implied contract.

Mot. for J. at 20 (quoting 46 C.F.R. § 525.2(a)(3)) (emphasis added).

But the CFC does *not* cover the same services that are provided by the terminal operators. It is not a charge for the stevedoring of cargo containers. *See* SOF ¶¶ 4, 5, 8, 12, 55. Nor do the terminal operators provide the Port Authority's infrastructure and security projects funded by the CFC. *See id.* Rather, the CFC is a charge to recover the Port Authority's costs for infrastructure improvements to the rail, roads, and increased security that provide increased efficiency and security for the movement of cargo containers through the port *after* the cargo containers have been unloaded from the vessels and en route to their final in-land destination (or for outbound cargo containers, *before* they are loaded onto the berthed vessels). *See* SOF ¶ 28.

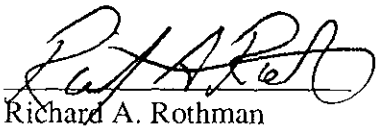
CONCLUSION

In short, Complainants' Motion for Judgment is founded on the specious premise—contrary to plentiful precedent—that the benefits they receive from CFC-funded projects are wholly irrelevant to their claims under § 41102(c) because they supposedly receive no "services." Because Complainants have failed to contest either the existence of the benefits they receive or the evidence that those benefits exceed the CFC-related cost that Complainants incur—while simultaneously blocking the Port Authority's efforts to develop the record more fully through discovery—they have utterly failed to carry their burden of showing that they are entitled to judgment as a matter of law.

For the foregoing reasons, Complainants' Motion for Judgment should be denied.

Dated: February 1, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

Via Federal Express: John P. Meade "K" Line America, Inc. 6009 Bethlehem Road Preston, MD 21655 Paul M. Keane Cichanowicz, Callan, Keane, Vengrow & Textor, LLP 61 Broadway, Suite 3000 New York, NY 10006 Matthew J. Thomas Reed Smith LLP 1301 K Street, N.W. Washington, DC 20005	Dated at New York, NY this 1st day of February, 2013

Camille A. George